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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. **75-1686**

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming in part and remanding in part a decision and order of the National Labor Relations Board which, in the main, dismissed an unfair labor complaint against United Aircraft Corporation.

OPINIONS BELOW

The opinion of the United States Court of Appeals in this case, and in a companion Section 301 case (in

which a petition for certiorari will be filed by May 27, 1976), entered on September 9, 1975, is not yet officially reported but is published at 90 LRRM 2272 and appears in the separate appendix (1a-82a).¹

The decision and order of the Board, issued July 1, 1971 (209a) and the recommended decision of the Trial Examiner, issued July 25, 1969 (248a), are reported at 192 NLRB 382.

JURISDICTION

A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals for the Second Circuit on December 29, 1975 (483a-484a). By order dated March 11, 1976, Mr. Justice Marshall granted an extension of time for filing this petition until May 20, 1976 (485a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.(a) Are courts empowered to deny enforcement of vital statutory rights and correlative duties, established by Congress to effectuate transcendent national purposes, because at the time of the violator's action the state of the law was unsettled and the violator could reasonably have believed that his conduct was lawful?

¹ To avoid duplication and for convenience the pertinent opinions and orders in both cases are collected and printed in a single appendix, cited "—a." References preceding a semicolon are to that appendix. The joint appendix in the court below in the companion case is designated "J.A." The joint appendix in the court below in this case is designated "B.J.A." Material contained in the appendix to this petition is designated "App."

(b) If so, may enforcement be denied where the finding of "reasonableness" disregards precedent pointing to the illegality of the conduct; where actual reliance upon the state of the law was not found and is disproved by the violator's "cover up" of his conduct; and without balancing against the violator's interest the respective equities of the employees and the national policy interest in enforcement?

2. Does the holding of *NLRB v. Fleetwood Trailer Co.* (389 U.S. 375, 379 n. 4)—that proof of legitimate and substantial business justification for conduct adversely affect statutory rights "relates to justification, and the burden of such proof is on the employer"—refer only to the burden of going forward, or does it also impose on the employer the risk of non-persuasion of that defense?

3. Did the Court of Appeals violate the teachings of *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194: 1) that an appellate court must judge the propriety of agency action "solely by the grounds invoked by the agency"; 2) that it may not "guess at the theory underlying the agency's action"; and 3) that it may not prohibit "retroactivity" of decisions in areas of "first impression"?

STATEMENT OF THE CASE

A. Operative Subsidiary Facts.

The relevant subsidiary facts are, for the most part, detailed in the companion petition. Those most pertinent to the questions here presented are summarized below.

6,536 economic strikers registered for reinstatement pursuant to August 11, 1960, Strike Settlement Agree-

ments which gave them preference to available jobs in order of seniority *inter sese* for four and a half months (9a). During the negotiations, the employer had led the Union to expect that strike related parts shortage bottlenecks would delay restoration of complements to pre-strike size only "temporarily" (15a-17a, 54a-55a) and that all strikers who registered, except those who had been permanently replaced, would be reinstated "immediately," meaning within a few weeks, that is, by about Labor Day. (15a, n. 5, 16a-17a, 54a-55a, 90a-91a). Permanently replaced strikers who were not recalled by Labor Day would be recalled as turnover created vacancies (15a, n. 5, 116a).²

The court below found (54a-55a):

"there is no question that the Union was under the impression that the principal reason that strikers would not be reinstated immediately was that they had been permanently replaced. * * * [T]he prospect of the complement remaining below pre-strike levels for the duration of the Agreement was never seriously discussed in negotiations. Thus, the issue of temporary job unavailability beyond the expiration of the Agreements was not a consideration."

However, the major bargaining unit complements "remained significantly below pre-strike levels" until the Agreements expired (13a). In consequence, jobs did not become available for over 1,500 registered

² No striker was ever identified as having been permanently replaced and the Company admitted during the course of this litigation that none had been (J.A. 226). In addition, as the district court found, the Company arbitrarily "labeled" temporary summer hires "permanent" (163a-167a).

strikers during the life of the Agreements (10a). In addition, during this period, the Company filled vacancies with non-striker absentees and, wherever possible, transferred "active" employees, instead of recalling registered strikers, to fill openings (25a-40a). Accordingly, complement depression adversely affected work opportunities *only for registered strikers*. No "active" employees were laid off during the life of the Agreements (J.A. 628-629, 655-656, 907-908, 553-554).

As soon as the Agreements expired, the employer terminated the "employee" status of the unrecalled strikers (123a, 127a-129a), advertised in the newspapers for help (123a; J.A. 2279-2282, 2363) and quickly (within four months) restored the complements to normal size (13a, 25a) with outsiders and selected strikers hired as new employees out of seniority order (which the Company had been bound to observe during the life of the Agreements) (9a, 13a). The Company "made no attempt to ascertain how many of the registered strikers were qualified to fill these available jobs" (123a).³

During what the court below characterized as "the hiring surge that occurred after January 1, 1961" (21a), Pratt and Whitney hired "over 1,700 employees" (25a), of whom only 278, less than 16%, were

³ However, those strikers whom the Company wished to rehire were sent an encouraging letter advising them that there were job openings in their former field of work; others, from the same occupational group and seniority area, frequently senior, were sent discouraging letters merely advising them that if they wished to apply the Company would consider them as new applicants (127a-128a; J.A. 2279, 2280). The Company offered no explanation for thus discriminating among strikers.

strikers (10a). In the first four months of 1961, Hamilton Standard hired 603 new employees (J.A. 2415-2416, 2445-2446), of whom only 177, or 29%, were strikers (10a, 13a). Almost all the new hires were assigned to "occupational groups" (93a), or "codes" of registered strikers. (J.A. 2262-2264; App. A p. 43, *infra*). The record contains "no explanation for the hiring between January-April, 1961, of such a large number of new employees as compared to strikers with superior work experience" (243a).

The Union was utterly dismayed by the low volume of striker recalls (5a, 10a-11a), but it did not know why so many were not being returned to work. The Company concealed the principal reason—complement depression—and pretended that the presence of replacements was *the only* reason. As described in App. B pp. 44-45, *infra*, it obfuscated and concealed the facts concerning complement depression until forced by the district court, on the eve of trial in February, 1967, to reveal the bargaining unit population statistics (J.A. 2297-2298, 2301-2302; 2412-2501A).

B. The Trial Examiner's Decision

The court below observed (46a):

"The Trial Examiner issued his 138-page decision on July 25, 1969, approximately four months after the district court had handed down its ruling finding that the company had not breached the Strike Settlement Agreement except in certain limited respects. As to the period from the end of the strike to December 31, 1960, the expiration date of the recall Agreements, the Trial Examiner also ruled generally in favor of the Company. However, the Trial Examiner held that the Company had violated section 8(a)(3) of the

Act by cutting off (as provided in the Agreements) the preferential hiring rights of strikers on December 31, 1960. He ruled that strikers not recalled by that date were entitled to preferential hiring treatment through April 1961, when full complements had been restored at all plants."

With respect to the alleged violations of Sections 8(a)(1) and (3) during 1960, the Trial Examiner did no more than adopt the reasoning of the district court (58a-59a, 60a, 405a-407a). With respect to the alleged Section 8(a)(1) and (3) violations in 1961 (402a-405a), the Trial Examiner did not purport to consider or apply the registered strikers' rights under *Fleetwood* (NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)), which held that strikers for whom jobs are unavailable because of strike-related temporary complement depression on the date they apply for reinstatement, are entitled to reinstatement as jobs which they are qualified to fill become available. Rather, he cited only "*The Laidlaw Corp.*, 171 NLRB No. 175," (405a, n. 14), in which the Board, by "permissible extension" (50a), of *Fleetwood*, had conferred reinstatement rights on strikers whose jobs had been filled by permanent replacement or permanently abolished,⁴ thereby overruling earlier cases holding that the "employee" status of *such* strikers terminated on the date they applied for reinstatement (49a-50a, 53a-54a). He failed to find a violation of the strikers' rights as applicants for employment (405a).

⁴ *Fleetwood*, rather than *Laidlaw*, applies to all registered strikers on the preferred hiring list as of December 31, 1960, who, the court below found, "were not recalled because reduced post-strike complements caused their jobs to be unavailable until after the expiration of the agreements." (48a).

C. The Board's Decision

1. Alleged violations during the settlement agreement period

Like the Trial Examiner, the Board purported to decide independently of the district court the Section 8(a)(1) and (3) issues during 1960, but it too adopted *in toto* Judge Clarie's findings, approach and conclusions (60a-62a). The Board held that the burden of proof on the depressed complement issue is on the Charging Parties and the General Counsel; that respondent has only the burden of going forward with an explanation after a *prima facie* case has been presented and that it is the burden of the Charging Parties and the General Counsel "to overcome [respondent's] answer" (219a). Here, the Board held, respondent answered the *prima facie* showing of violation "by evidence of the production imbalance", which the General Counsel and the Charging Parties failed to "overcome" (*id.*).⁵

2. Alleged violations after expiration of the settlement agreement

A majority of the Board, by 3-2 vote, held that "the Union had bargained away the reinstatement rights of those strikers who had not been rehired by the expiration date of the Agreements." (46a, A. 224-229a). It thereby overruled *sub silentio* the Board's uniform, historic, position that "statutory reinstatement rights represent a limit set by Congress on the risks to be borne by individual strikers [and therefore] are not subject to waiver by a collective bargaining representative." (52a; App. 242a).⁶

⁵ However, the Board misstated petitioners' position on the depressed complement issue (218a-219a).

⁶ Cf. *NLRB v. Magnavox Co.*, 415 U.S. 322, 327-328 (1974); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

The majority treated the reinstatement rights involved as stemming *only* from *Laidlaw*, although, as the dissenters pointed out (243a-245a), and the court below held (52a), the rights stemmed *entirely* from *Fleetwood* insofar as job unavailability resulted from the depressed complements, see p. 7, n. 4 *supra*. The majority did not apply the standard test: whether there had been a "knowing and voluntary" waiver (52a). Instead it relied for the most part on two factors: (1) "the Company made concessions which it might not have been willing to make if it knew that the Charging Parties would repudiate part of the recall Agreement" (225a); and (2) "At the time the recall agreement was signed in 1960, the prevalent rule could reasonably have been regarded as having been that an economic strikers' right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list" (226a). The Board did not expressly find, however, that this rule "could reasonably have been regarded" as applying where, as in *Fleetwood* and in this case, the reason no vacancy existed on the date of application was temporary complement depression resulting from production difficulties occasioned by the strike itself and the presence of temporary replacements.⁷ Nor did the

⁷ In its brief to this Court in *Fleetwood*, the Board had represented that the rule was *not* applicable to such temporary job unavailability, analogizing *inter alia* to temporary replacement:

" * * * the situation where the striker's job is temporarily unavailable due to a reduction in production caused by the strike is not distinguishable in any meaningful sense from one where the striker's job is unavailable because of other temporary measures taken to meet the strike, e.g., a tem-

Board consider that petitioners' "repudiation" of "part of the recall agreement" resulted from prolonged temporary complement depression—a condition not contemplated by the parties (54a-55a; cf. Board dissent, 240a-241a).⁸

The majority did not address the question whether the Company's treatment of unrecalled strikers vis-a-vis strangers and other strikers in 1961 was inherently discriminatory and destructive of statutory rights or discriminatorily motivated, pp. 5-6, *supra*.

Members Fanning and Brown dissented from the refusal to find that the treatment accorded registered strikers in 1961 violated Section 8(a)(1) and (3) 238a-245a). They pointed out that *Fleetwood* rather than *Laidlaw* rights were involved because, but for unforeseen prolongation of the contemplated temporary complement depression all the strikers would have been reinstated by the time the complements had been restored to normal size (241a-242a, 243a, 245a); that the Strike Settlement Agreements cannot

porary rescheduling of production, or performance of the work by other employees under a makeshift arrangement. It is well settled that, in the latter situations, the striker's right to reinstatement is not lost, as it would be in the case of job abolition. See *Firth Carpet Co. v. National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2) * * *." (Brief for NLRB, No. 49, Oct. Term, 1967, pp. 17-18.)

⁸ The majority also asserted (226a-227a) that *Wooster Division of Borg-Warner Corporation*, 121 NLRB 1492, 1495 (1958) was "specific precedent for the validity of the recall agreement." The Board confessed error on this assertion in its brief to the court below, but denied that the error was "significant" because the "instant case and *Laher Spring* would still be the first occasions in which the Board confronted the impact of *Fleetwood* on recall agreements."

be construed as terminating statutory recall rights as of December 31, 1960, because the agreements were predicated on the assumption that full complements would be restored by Labor Day (239a-240a); that enforcement of *Fleetwood* rights involves no retroactivity problem, because *Fleetwood* did not "make new law with regard to the reinstatement rights of the economic strikers there involved and the ones in the instant case" (243a); and that even a knowing and deliberate waiver of *Fleetwood* rights would be unenforceable because "repugnant to the purposes and policies of the Act." (242a). They also stated that the Company's unexplained conduct in running "newspaper ads for new employees and * * * hiring between January-April 1961 * * * such a large number of new employees as compared to strikers with superior work experience * * * is inherently destructive of important employee rights, without reference to employer intent" (243a).

D. The Court of Appeals' Decision

1. Alleged violations in 1961.

The court below recognized that *Fleetwood* rights are involved (52a-55a), and it rejected the Board's "waiver" finding (*id.*). The court held that there could have been no "knowing and voluntary waiver" of *Fleetwood* rights in 1960 because (1) *Fleetwood* was not decided until 1967 (52a) and (2) inasmuch as prolonged complement depression resulting from parts shortage difficulties was not within the contemplation of the parties, petitioners "could not have knowingly waived" statutory reinstatement rights arising from *that* situation (54a-55a).

The court refused to find or remedy the violation of *Fleetwood* rights, however, on the ground that (56a) "a reasonable reading of decisions existing in 1960, particularly *Atlas Storage Division*, * * * ^[9] would be that the same rule [governing strikers who had been permanently replaced or whose jobs had been eliminated] applied to strikers whose jobs were temporarily unavailable at the close of the strike * * *." (See also 54a). The court disclosed that it found "no Board or court decision" as of 1960, dealing with the situation of

"employees whose jobs were only temporarily unavailable at the time of their application for reinstatement, the situation considered by the Supreme Court in *Fleetwood*." (53a).

It also found (*id.*) that

"*Atlas Storage Division* can be read as applying only when an economic striker's job has been *permanently eliminated* by an employer. But there is a basis for concluding that the same rule should apply to temporary job unavailability, for in either case a striker could reasonably be expected to have an opportunity to regain a position with his employer." (Emphasis added.)

On that basis (56a-57a):

"At the termination of the strike, one could have concluded that those strikers whose jobs were not available when the strike terminated, whether because they had been permanently replaced or because of production dislocations caused by the strike, had no further statutory right to rein-

⁹ 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Teamsters & Helpers "General" Local No. 200 v. NLRB*, 233 F.2d 233 (7 Cir. 1956).

statement, other than not to be discriminated against in favor of other new applicants for employment. * * * [W]hen, on December 31, 1960, jobs were not available to certain strikers, the statutory reinstatement rights of those individuals were extinguished.

Because *Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed, it would be unjust to use those cases to impose liability fifteen years after the events at issue transpired.

This is not a case in which the employer sought in bad faith to discriminate against strikers. * * * Throughout the strike settlement process, the Company had the advice of experienced labor counsel. The Strike Settlement Agreements providing for the preferential recall of strikers to jobs in their seniority areas which they were qualified to perform exceeded requirements of existing law. Under these circumstances we are not at this stage disposed to permit imposition of a substantial liability upon the Company."

The court below also held that the Trial Examiner's finding that there was no "pattern of discrimination" against strikers in 1961 was sustained by the evidence that the Company had invited all unrecalled strikers to file applications for employment as new employees, and, from January 1, to April 30, 1961, had hired a larger percentage of striker applicants than strangers who applied (57a-58a).

2. Alleged violations during 1960.

The court sustained the Board's depressed complement holding (60a-62a) including the Board's allocation of the burden of proof (61a-62a, n. 56). It

remanded the issue of transfers, promotions and non-striker absentees for reconsideration (62a-66a, 82a), stressing that the Board is not bound by the court's resolution of those issues in the companion case (64a).¹⁰

REASONS FOR GRANTING THE WRIT

Summary as to Question 1

The court below refused to find and remedy a violation of strikers' *Fleetwood* rights because it considered it "unjust" to do so inasmuch as, at the time of the acts in question, one could reasonably have believed, although it had never been decided, that temporary job unavailability due to strike-connected production difficulties was the legal equivalent of permanent replacement or job elimination. Assertion of discretion to deny enforcement of statutory rights for that reason is breach of the "duty" declared in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-417, 419-422 (1975). "Good faith" based on an "unsettled state of the law" is not a permissible ground for frustration of "transcendent legislative purposes" and "important national goals" (422 U.S. at 417). As petitioners in Nos. 75-1475 and 75-1478 assert, on this point the decision in *United States v. United States Steel Corp.*, 520 F.2d 1043, 1059 (5 Cir., 1975), is in square conflict with the decision below in this case.

The existence of precedent susceptible to conflicting interpretations is but an example of the "good faith" defense to retroactivity, which this Court rejected in *Albemarle* and *Hanover Shoe Co. v. United Shoe*

¹⁰ "The Board's findings were certainly not required to be parallel and indeed still ultimately may not be." (63a, n. 61).

Mach., 392 U.S. 481, 496 (1968). That defense cannot prevail merely because it is thought that the interpretation favorable to the actor was the more likely to be adopted. The posture of the law was more favorable to United Shoe's position than to United Aircraft's. Furthermore, a distinction based on the degree of reasonableness of the actor's belief in the legality of his conduct is incompatible with the "principled application of standards consistent with [transcendent national] purposes." *Albemarle, supra*, 422 U.S. at 417.

The decision below, if permitted to stand, would support a retroactivity defense in the vast majority of contested cases, not only under the National Labor Relations Act, but under all federal regulatory statutes. The legality of challenged conduct is rarely litigated unless the defendant believes he has at least a reasonable chance to prevail. Moreover, the decision will inspire widespread gambling with conduct of "questionable legality" (*Albemarle, supra*, 422 U.S. at 422), whenever that conduct is less expensive or more profitable than conduct which assuredly does not violate the statutory rights of others. For, under this decision, the actor can escape liability for his action not only if his legal position is sustained but also if it is deemed "reasonable." To thus invite experimentation at the fringes of the law will inevitably proliferate litigation and further burden the regulatory agencies and already burgeoning court dockets.

The nature of the judicial process cannot accommodate a "good faith" defense short of reliance on squarely applicable authoritative precedent subse-

quently overruled. A judgment, however reasonable, as to what the law will turn out to be unavoidably entails risk: "it is part of the game of life; we have to pay in countless ways for the absence of prophetic vision."¹¹ Moreover, only the prospect of retrospective back pay liability can inspire respect for the inchoate rights of others, and award of back pay is necessary to secure "complete justice" to the victims. *Albemarle, supra* at 418. *A fortiori*, a "good faith" defense must be rejected where, as here, the violator did not even claim *actual* reliance on the then state of the law, and his "cover up" disproves reliance; where a Trial Examiner, the Board, one of three Circuit Judges and this Court all rejected as untenable the proffered interpretation of precedent the first time it was presented; where it depends upon inventing a novel (and erroneous) rationale for the precedent assumed to have been most closely in point; and where the unsettled question of applicability concerned a rule based on misconstruction by inferior tribunals of an opinion of this Court interpreting an Act of Congress. Thus, under the rubric of avoiding "retroactivity," the court below granted respondent dispensation, at the expense of its victims, for what was, at best, a "reasonable" mistake of law by respondent.

Even if, contrary to reality, this were a true overruling situation, so that a retroactivity defense could be entertained, that would "simply open[] the door to equity; it [would] not depress the scales in the employer's favor." *Albemarle, supra*, at 422. The Third, Fifth and Seventh Circuits, in contrast to the

¹¹ Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 142-143.

court below and the District of Columbia Circuit, have all balanced the equities in favor of strikers' statutory rights and effectuation of the important national purposes they serve, giving retrospective effect to overruling decisions. This division reflects a conflict of basic values which should be resolved by this Court.

I. THE COURT OF APPEALS' REFUSAL TO ACCORD THE STRIKERS THE STATUTORY RIGHTS DECLARED IN FLEETWOOD WAS GRAVE ERROR WARRANTING REVIEW.

A. The crucial assumption of the decision below, that a court of appeals is empowered to refuse to find and remedy a violation because it is "not * * * disposed to permit imposition of a substantial liability" (57a), where one "could have concluded" from a "reasonable reading of decisions" (56a), that the transgressor was authorized to act as it did, is in square conflict with the teaching of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-417 (1975). This Court there said (at 417):

"when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' * * * Important national goals would be frustrated by a regime of discretion * * *."

As under Title VII of the Civil Rights Act of 1964 involved in *Albemarle*, so under the National Labor Relations Act, "transcendent legislative purposes" and "[i]mportant national goals would be frustrated by a regime of discretion." Fixing "the limit of the risk [an employee] runs by striking" (*N.L.R.B. v.*

Industrial Cotton Mills, 208 F.2d 87, 91 (4 Cir. 1953), cert. denied, 347 U.S. 935), by protecting strikers' reinstatement rights and opportunities, is the very keystone of promotion of collective bargaining and hence of national labor policy. *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221, 233-235 (1963); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Accordingly, courts of appeals have "not merely the power but the duty" (*Albemarle, supra*, 422 U.S. at 418), to vindicate those rights and policies. Declination because a court believes enforcement would be "unjust" (56a-57a) to a transgressor is incompatible with judicial duty as defined by this Court.

B. *Albemarle* rejected equitable discretion to deny back pay against a "good faith" violator under a statutory scheme "expressly modelled on the back pay provision of the National Labor Relations Act" (422 U.S. at 419), which authorizes, but does not expressly mandate, back pay (*id.* at 415-417, 419-421). The Court said that Congress approved awards of "back pay as a matter of course— * * * not merely where employer violations are peculiarly deliberate, egregious, or inexcusable." (*id.* at 420)

The Court expressly held that "it is not a sufficient reason for denying back pay" that *Albemarle's* breach "had not been in 'bad faith'" (422 U.S. at 422), explaining (*id.*):

"If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply

because his employer did not inflict it in 'bad faith' "¹⁰

¹⁰ The backpay remedy of the NLRB on which the Title VII remedy was modeled, see n. 11, *supra*, is fully available even where the 'unfair labor practice' was committed in good faith. See, e.g., *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. at 265; *American Machinery Corp. v. NLRB*, 424 F.2d 1321, 1328-1330 (CA 5, 1970); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 107 (CA 7 1969)."

In *Albemarle*, the principal basis for the district court's finding of lack of "bad faith" was that "judicial decisions had only recently focused directly on the discriminatory impact of seniority systems." *Id.*, at n. 15. This is indistinguishable in principle from the predicate of the holding below, that "there was in 1960 no Board and court decision dealing with * * * temporary job unavailability on the date of application, "the precise issue presented in *Fleetwood*" (53a, 56a). Both holdings equate good faith with an unsettled state of the law. In *Albemarle*, this Court defined "bad faith" as "maintaining a practice which [the employer] knew to be illegal or of highly questionable legality." 422 U.S., at 422. A "reasonable belief" that the practice was lawful is thus the *sine qua non* of good faith. And the holding below that back pay liability should not be imposed because there was "reasonable ground" for believing that temporary job unavailability due to strike resultant production difficulties is the legal equivalent of permanent replacement or job elimination is therefore a holding that back pay liability should not be imposed upon a good faith violator.^{11a}

^{11a} Assertion that the preferred hiring list "exceeded requirements of existing law" (57a) is based on the erroneous assumption that strikers for whom jobs were unavailable on the date of appli-

The Court of Appeals for the Fifth Circuit has read *Albemarle* as approving its own decisions which "have thoroughly rejected ['unsettled state of the law'] as a defense to back pay liability". *United States v. United States Steel Corp.*, 520 F.2d 1043, 1059 (5 Cir., 1975). Defendants in that case have petitioned for certiorari, asserting conflict with the decision of the Second Circuit in this case. *United States Steel Corp. v. Ford*, No. 75-1475, Petition for Certiorari, p. 24; *United Steelworkers of America, etc. v. Ford*, No. 75-1478, Petition for Certiorari, p. 24. We submit that both decisions cannot rationally coexist.

The decision below cannot effectively be limited on the theory that the question was not "an entirely open one" (56a) prior to *Fleetwood* because precedent could reasonably be construed as covering the situation. In a large majority of contested cases, there is precedent open to conflicting interpretations. Nor is a case removed from the "unsettled state of the law" category if it can be reasonably thought that the interpretation favorable to the action is the more likely to prevail, as the court below erroneously believed, see pp. 23-27, *infra*. Indeed, the posture of the law was more favorable to the defendant in *Hanover Shoe* than to *United Aircraft*, *Id.* In any event, a distinction based on the degree of reasonableness of the actor's belief in the legality of his conduct is incompatible with "principled application of standards consistent with [transcendent legislative] purposes" (*Albemarle*, *supra*, 422 U.S. at 417), for such a distinction would import "a regime of discretion" which "varies like the Chancellor's foot." (*id.*)

cation because of temporary complement depression and the presence of temporary replacements (116a, 163a-167a), lost their "employee" status. See also, pp. 28-29, *infra*.

In *Hanover Shoe Co. v. United Shoe Mach.*, 392 U.S. 481, 496 (1968) the Court squarely rejected the "unsettled state of the law" defense to monetary recovery for injuries caused by violation of § 2 of the Sherman Act. The Third Circuit had held that damages could commence only from the date of a decision of this Court which it believed "fundamentally altered the law of monopolization" (*id.* at 495); it based its conclusion of fundamental alteration largely on prior litigation in this Court in which the same defendant's challenged practices had escaped condemnation under § 1 of the Act. This Court reversed in terms which mandate reversal here as well:

The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. * * * *There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful.* Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals. (*Id.* at 496) (Emphasis added.)

The court below acknowledged that this case, likewise, does not present "such a situation" (53a, 56a).

The controlling distinction between an overruling decision and one which clarifies previously unsettled law was explicitly recognized in the single retroactiv-

ity decision which the court below purported to follow: *Retail, Wholesale and Department Store Union (RWDSU) v. NLRB*, 466 F.2d 380, 391, n. 26 (App. D.C., 1972). It distinguished between "the kind of case where the Board 'had not previously been confronted by the problem' and was required by the very absence of a previous standard and the nature of its duties to exercise the 'function of filling in the interstices of the Act,' [and] a case where the Board had confronted the problem before, had established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted."¹²

The distinction is firmly grounded in principle. In *RWDSU* the court explained denial of retrospective effect to an overruling decision (*Laidlaw*) as resting on (*id.*, at 392) " * * * the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon." These principles require no less that, short of overruling ineluctibly applicable "well established and long accepted" law (*id.* at 391), the risk of legal uncertainty be borne by the actor who turns out to be wrong. Mr. Justice Cardozo explained that "we have to pay in countless ways for the absence of prophetic vision";¹³ the risk of reliance on prophecy, however reasonable, as to what unsettled law will turn

¹² *Id.* at 391, quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203. See also *id.* at n. 26, quoting with approval Davis, *Administrative Law* § 17.08 (1970 Supp.): "Surely the difference between [retroactive clarification of uncertain law] and retroactive change in clear law that has been specifically relied upon *can and should* be recognized." (*Id.*, emphasis added.)

¹³ Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 145.

out to be, is fairly placed on the actor, particularly where he has an option which will surely *not* prejudice rights of others.

The Court made this very point in *Albemarle, supra*, 422 U.S. at 417-418, in demonstrating the insufficiency of injunctive relief: "If employers faced only the prospect of [liability for conduct after adjudication], they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst * * *' to refrain from gambling with inchoate rights of others. In addition, backpay is "necessary" to secure "complete justice" to the victims. *Id.*, at 418.

C. We have thus far accepted the Court of Appeals' premise that in 1960 there was reasonable ground for concluding that *Atlas Storage* implied that strike-resultant temporary job unavailability on date of application terminated strikers' statutory "employee" status. But that assumption itself raises questions which are most appropriate for this Court to decide. First, the assumption is derived, in part, from misinterpretation of *Fleetwood*. The court below reasoned backwards:

"If the Supreme Court in *Fleetwood* had not changed the law as it applied to reinstatement of economic strikers but instead simply reaffirmed long-established principles, we doubt that the case would have so immediately prompted the Board [in *Laidlaw*] to change course and overrule three of its prior decisions (*Brown & Root Inc., supra*; *Bartlett Collins Company, supra*; and *Atlas Storage Division, supra*)."

The fallacy is apparent. Whether *Fleetwood* "changed the law" with respect to the rights of economic strikers *whose jobs were temporarily unavailable* depends on what the state of the law had been with respect to the rights of *such* strikers, not on what the law was with respect to strikers whose jobs had been *permanently* eliminated or who had been *permanently* replaced, as in the three decisions cited by the Court of Appeals. That the *Fleetwood* majority, over the objection of the concurring opinion, declared principles broader than necessary to dispose of the case before it does not support the conclusion that the Court thereby reversed prior law governing the situation in *Fleetwood*.¹⁴ If this Court had thought in *Fleetwood* that it was changing the law in temporary complement depression cases, it would have had to confront the retroactivity issue squarely posed in Judge Pope's concurring opinion below (366 F.2d at 130).

The method employed below in determining the status of the law for the purpose of evaluating a retroactivity defense is in square conflict with this Court's method in *Hanover*. There, Justice White painstakingly and skeptically examined United Shoe's argument, although supported by independent commentators, that authoritative decisions and judicial pronouncements *squarely authorized* its conduct. Here, where no such claim was or could have been made,

¹⁴ Mr. Justice Harlan, joined by Mr. Justice Stewart, wrote: "The issue in this case seems to me rather simpler, and the indicated resolution of it rather more obvious, than the majority opinion implies." (389 U.S. at 381.) If a majority of the Court had adopted this approach, there might have been no *Laidlaw*, but the result in *Fleetwood* would have been the same, and no one would ever have conceived of a retroactivity issue in *United Aircraft*.

the court confined its attention to a single precedent, for which it invented a rationale which could, at best, *arguably* support its extension to respondent's action,¹⁵ ignoring all precedents which looked to the contrary.¹⁶

¹⁵ Central to the Court's analysis is the following rhetorical question:

"Why, if an employer was not required to seek out employees whose jobs had been abolished or absorbed even though, *as expressly recognized in Atlas Storage Division, vacancies would likely occur soon thereafter*, should an employer be required to seek out those whose jobs would be unavailable for an indefinite period of time?" (56a, emphasis added.)

The question is based on a misreading of *Atlas*: there is nothing in *Atlas* which recognized or even mentioned a *likelihood* that vacancies would occur soon, much less considered what effect, if any, such likelihood should have on strikers' status or reinstatement rights. Accordingly, the analogy between anticipated turnover and anticipated complement reflation has no basis in *Atlas*, which, perhaps, is why it has never previously been suggested by anyone, including the two Judges of the Ninth Circuit who found the Board's decision in *Fleetwood* inconsistent with *Atlas*.

¹⁶ As the Board argued to this Court in *Fleetwood* (see p. 9, n. 7, *supra*), *Firth Carpet Co. v. NLRB*, 129 F.2d 633, 636 (2 Cir., 1942), held that *temporary replacement* does not result in loss of the right to reinstatement although permanent replacement under *Mackay Radio* (304 U.S. 333), does. *Kansas Milling Co. v. NLRB*, 185 F.2d 413, 420 (10 Cir., 1950), also so held. We submit that, in 1960, counsel knowing that *Mackay* had been so limited, could not reasonably have expected that *Atlas* would be extended to cover temporary complement depression.

Other precedents existed in representation cases, where, from 1947 on, strikers' eligibility to vote had depended upon their entitlement to reinstatement (Act, Sec. 9(c)(3)), and the Board, applying *Mackay* (*Union Mfg. Co.*, 101 NLRB 1028 (1952)), had consistently distinguished between temporary and permanent complement depression. See, e.g., *Pipe Machinery Company*, 79 NLRB 1332, 1326-1327, 1328 (1948); *Midwest Screw Products Co.*, 86 NLRB 643, 644 (1949); *E. J. Kelley Co.*, 98 NLRB 486, 488 (1952); *Cuttingham Buick, Inc.*, 112 NLRB 386, 387 (1955); *Union Mfg. Co.*, 123 NLRB 1633, 1635 (1959).

Above all, the Court of Appeals ignored what this Court actually said in *Mackay Radio*, see text and note at p. 27, n. 17 *infra*.

Further in conflict with *Hanover's* approach, the court relied on the mere fact that two Judges in the Ninth Circuit had equated temporary depression with job abolition; disregarding the facts that the Trial Examiner and the Board in *Fleetwood* considered the equation so patently false as to warrant its rejection without comment; that the dissenting Ninth Circuit Judge could not "accept", or even "see" the majority's reasoning and declared that their holding "cannot * * * be justified" (366 F.2d at 131), and that this Court, in sustaining the Board's distinction of temporary complement depression from permanent replacement and job elimination (389 U.S. at 379, 381; *id.* at 382-383, concurring opinion) did not even deem it necessary to mention the claimed inconsistency of that decision with *Atlas*.

The court below leaped from its unfounded assumption that *Atlas* provided *reasonable grounds to believe* that these unreplaced strikers lost their rights to the even wilder conclusion that those rights did not *exist* until this Court decided *Fleetwood* (56a). Quite aside from its lack of internal logic, and its invitation to raise a "good faith" defense in every fairly litigable case, that conclusion is inconsistent with, and thwarts, Congress' decision to make strikers' rights and employers' correlative duties effective *as of 1935*. And if the Court of Appeals' decision is to be understood as meaning that these rights and duties existed until the Seventh Circuit decision, but were thereafter suspended until *Fleetwood*, the difference is one of degree, not principle, for courts of appeals are not authorized to suspend the effectiveness of Acts of Congress.

The decision below is also inconsistent with the status of this Court as the ultimate interpreter of legislation. First, and most obviously, it denies effect to this Court's interpretation of the Act in *Fleetwood*. Second, the entire loss-of-"employee"-status doctrine stemmed from misinterpretation by inferior tribunals of this Court's decision in *Labor Board v. Mackay Radio*, 304 U.S. 333, 346-347 (1938). See *Little Rock Airmotive, Inc. v. NLRB*, 455 F.2d 163, 166 (8 Cir., 1972).¹⁷ Given *Mackay*, if anything was nonexistent in 1960 it was a privilege to terminate the statutory "employee" status of innocent strikers without a decision of this Court so interpreting § 2(3). As Judge Cardozo said: "We will not help out the man who has trusted to the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk in the game of life, not different in degree from the risk of any other misconception of right or duty."¹⁸

In short, if *Fleetwood* and its antecedents are properly understood, it is clear that the Court of Appeals, in the guise of preventing "retroactivity", has exonerated respondent for what was, at best, a mistake of law. That holding is an innovation in the administration of the National Labor Relations Act with such sweeping potential ramifications that it should be extirpated at its first appearance.

¹⁷ "*Mackay* * * * apparently limited the employers' options, absent a valid reason for refusing reinstatement to a particular employee, to 'determining which of its striking employees would have to wait because five men had taken permanent positions during the strike . . .'" * * *

The Board, however, did not read *Mackay* so liberally." 455 F.2d at 166, quoting 304 U.S. at 347.

¹⁸ Op. cit. n. 11, p. 16, *supra*, pp. 147-148.

D. The decision below conflicts with *Hanover Shoe* and *RWDSU* also on the essential element of reliance. *Hanover* establishes that the equitable consideration underlying a retroactivity defense is that the actor "significantly relied upon" precedent. 392 U.S. at 496. And in *RWDSU* Judge McGowan not only found that the "Company attempted to conform its conduct" to a "standard" which was subsequently overruled, he detailed the evidence which demonstrated *actual* reliance (466 F.2d at 391-392).

In this case, by contrast, the Court of Appeals could find only that "throughout the strike settlement process, the Company had the advice of experienced labor counsel" (57a). There is no evidence, and the court did not find, that counsel had advised that strikers for whom jobs were temporarily unavailable because of the depressed complement on the date they registered for work lost their statutory "employee status", or that their termination after the settlement agreement expired, when the complements were still depressed and thousands of jobs were immediately available, would be lawful, or that the "Company attempted to conform its conduct" to existing law. During discovery, the Company had successfully objected to production of any memoranda, notes and correspondence containing "legal advice given by counsel" (J.A. 1216, 1218, 1219) and, at trial, it introduced no evidence whatsoever that it had relied on a legal theory, although its principal labor relations officials all testified.

In fact, the record in this case negates reliance. United Aircraft's contemporaneous conduct establishes that it knew full well that under the law as it then stood it was permitted to terminate reinstatement

rights *only* of strikers who had been permanently replaced or whose jobs had been abolished. The district court found that during the strike the Company arbitrarily mislabelled temporary summer hires "permanent" (163a-167a). On June 26, 1961, it told the NLRB: "[t]he truth very simply is that if the Company failed on August 13 [at the end of the strike] to reinstate a striker to his former job, it was necessarily because the job was filled by a replacement or because his old job had been *eliminated*." (J.A. 2253-2254, emphasis added).

Most tellingly, the Company denied for four years that the complement had been temporarily depressed and, until 1967, concealed the bargaining unit population figures which would have shown the extent to which temporary depression was responsible for job unavailability. App. B, *infra*. If the Company had seriously believed that as a matter of law temporary complement depression was the equivalent of permanent job abolition it would not have engaged in this lengthy and elaborate course of concealment and deception, including labeling temporary hires "permanent."

E. Even if *Atlas* had been squarely in point it would not follow that denial of retrospective liability was proper. An overruled decision "simply opens the door to equity; it does not depress the scales in the employer's favor." *Albemarle, supra*, 422 U.S. at 422. The Third, Fifth and Seventh Circuits have all rejected the retroactivity defense and vindicated strikers' rights even where the *Hanover* conditions were met. *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221 (1963), expressly disapproved (*id.* at 222) the decision of the Ninth Circuit in *NLRB v. Potlatch Forests, Inc.*, 189 F.2d 82 (1951), which had held that the grant of superseniority to strikers—the precise con-

duct involved in *Erie Resistor*—was not *per se* unlawful. On remand, Erie asserted a retroactivity defense which the Third Circuit rejected:

*"It is argued that the representatives of the Company acted in good faith in the honest belief that they had a right to adopt the job assurance plan to protect replacements. We are of the view that good faith, based upon an erroneous interpretation of the law, is not available as a defense. [Citations omitted.] An employer who pursues a course of conduct later determined to be an unfair labor practice does so at his peril. Ibid. We can perceive no inequity in the Board's directives. The equities in this case seem to favor the employees; it would be inequitable to require them to absorb pay losses ascribable to the unfair labor practice of the Company."*¹⁹

The Seventh and Fifth Circuits have held that *Laidlaw*, which, unlike *Fleetwood*, truly overruled prior precedent, see p. 7, *supra*, applies retroactively to employers who, in reliance on *Atlas Storage*, had denied reinstatement to permanently replaced strikers. *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 107 (7 Cir., 1969), cert. denied 397 U.S. 920; *American Machinery Corp. v. NLRB*, 424 F.2d 1321, 1328-1330 (5 Cir., 1970). Both courts followed the teaching of *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), that the effect of retroactivity "must be balanced against the mischief of producing a result which is contrary to a statutory design as to legal and equitable principles." As the Fifth Circuit said: "Consequently, we must look not only to the consequences for American Machinery, but to the statutory scheme and to the effects on the strikers if we do not enforce the order"

¹⁹ *International U. of E., R. & M. Wkrs., Local 613 v. NLRB*, 328 F.2d 723, 727 (3 Cir. 1964), emphasis added.

(424 F.2d at 1329). Concern for those "effects" is likewise at the root of *Albemarle, supra*. The court below, in contrast, looked only to the consequences for United Aircraft and ignored the effects of its decision on the statutory scheme and on the strikers.²⁰ In this it grievously erred.

Indeed, if the court had balanced the competing interests as *Chenery* requires, it would necessarily have concluded "that the importance of protecting the statutory rights of [the] employees outweighs the fact that the company may have relied on a prior Board rule or policy" (*Laidlaw*, 414 F.2d at 107).²¹ For, as the General Counsel successfully

²⁰ In *RWDSU* the D.C. Circuit likewise failed to consider the strikers' countervailing interests, or the adverse consequences on the statutory scheme which the Seventh and Fifth Circuits deemed decisive. The *RWDSU* court sought to distinguish *Laidlaw* and *American Machinery* on the basis that in both those cases the court had sustained the Board's alternate theory that the employer was discriminatorily motivated. 466 F.2d at 392. But the cases cannot properly be so limited. In discussing retroactivity the *Laidlaw* court made no reference to the motivation finding, but assumed legitimate reliance on the prior Board rule, compare 414 F.2d at 107 with *id.* at 106, discussing motivation; the *American Machinery* court stated that the "finding of discriminatory motivation and the failure to rehire further reinforces our conclusion in this case" (*id.* at 1330, emphasis added),—a conclusion deemed compelled by what *Chenery* "teaches" (*id.* at 1328).

²¹ So here. By eliminating thousands of the Union's most militant members from the work force, and making an object lesson of those who returned as new employees, the Company destroyed the capacity of the Union effectively to protect employee interests against management. Thus, by relieving the Company of liability the court allowed it to retain the "enjoyment of advantage[s] which [it] had gained by violation of the Act", contrary to the purpose of the unfair labor practice proceedings, *National Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940).

argued in that case: "Unless the disadvantaged strikers are compensated, they will have been penalized for exercising statutorily protected rights and the effect of discouraging future such exercises will not be completely dissipated. * * *" (*id.*). In reaching the same conclusion the Fifth Circuit relied also on *NLRB v. Rutter-Rex*, 396 U.S. 258, 265 (1969), which held that "the Board could properly conclude that backpay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." We believe it is precisely because these cases establish that the denial of retroactivity is inconsistent with the legislative policy and purposes of the National Labor Relations Act that this Court cited *Rutter-Rex*, *Laidlaw* and *American Machinery* in footnote 16 of *Albemarle*, 422 U.S. 422, quoted at p. 19, *supra*.²²

²² Failure to consider the strikers' equities also fatally infected the Court of Appeals' consideration of the two factors which it deemed controlling. The first and apparently foremost consideration was the "substantial liability" which the Company faced. But substantiality is a product solely of "the sheer number [of discriminatees] involved", (66a, n. 61), and represents "only actual losses" suffered by the employees as a result of the Company's violation. *Labor Board v. Phelps Dodge Corp.*, 313 U.S. 177, 198 (1941). The court cites no authority for the patently unconscionable proposition that all the discriminatees should be denied back pay because there were so many of them, and that the Company should be relieved of all liability because it inflicted injury on so many. Moreover, the Company's *net* loss would be much less than its liability. For example, a major element thereof is the difference between what it paid those strikers who were hired as new employees, and what it would have paid them if it had reinstated them to their former positions in accordance with the requirements of the Act.

So too, particularly in view of the court's rejection of the Company's contention that the Charging Parties and the General Coun-

In the absence of an explicit, legally justified, determination that the inequity of retroactivity outweighs the equities of the strikers and effectuation of the policies of the Act, "the argument of retroactivity becomes nothing more than a claim that the [Board] lacks power to enforce the standards of the Act in this proceeding. Such a claim deserves rejection." *SEC v. Chenery Corp.*, *supra*, 332 U.S. at 203-204.

II. THE COURT OF APPEALS' MISUNDERSTANDING OF FLEETWOOD'S "BURDEN OF PROOF" RULE REQUIRES REVIEW, REVERSAL AND REMAND TO THE BOARD.

The Court of Appeals' approval of the Board's holding that respondent met its burden on the depressed complement issue by producing "evidence of the production imbalance" p. 8, *supra*, is in conflict with *Fleetwood*, where this Court held that proof:

"that the jobs of complainants had not been absorbed or that they were still available" * * * is not essential to establish an unfair labor prac-

sel were to blame for the delay (66a, n. 61), was the court's reliance on delay as a factor militating against relief in square conflict with *NLRB v. Rutter-Rex*, 396 U.S. at 264.

Indeed, early in the administration of the Act the Court rejected an "employer's objection to the burden of back pay placed upon it because of the Board's alleged delay in entering the final order" (*Labor Board v. Electric Cleaner Co.*, 315 U.S. 685, 697-698 (1942)), saying in part, "[w]e cannot penalize the employees for this happening" (*id.* at 698). Again, in *NLRB v. Katz*, 369 U.S. 736, 748, n. 16 (1962), the Court held: "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." Denial of *all* relief because *any* relief must be delayed would be doubly unjust in the present case for, to the extent that it can be attributed to either side rather than to the scope of the litigation (66a, n. 61), delay is attributable to the Company's stubborn concealment of complement depression (see App. B).

tice. [Such proof] relates to *justification*, and the burden of such proof is on the employer. *NLRB v. Great Dane Trailers*, supra, 388 U.S. [26] at 34 * * *. Cf. also *NLRB v. Plastilite Corp.*, 375 F.2d 343, 348 (C.A. 8th Cir. 1967)." 389 U.S. at 379 (emphasis added).

The Court of Appeals interpreted this as follows:

"The Supreme Court's concern in *Fleetwood* was that an employee not have the burden of himself showing the *lack* of business justification when all the proof relating to justification was in possession of the Company. It is incumbent on the Company to come forward with what evidence of justification that it might have. *Fleetwood* did not, as we read it, decide what party ultimately bore the risk of nonpersuasion in the event that after all the evidence is in the scale remains evenly balanced. The employer in *Fleetwood* had presented no evidence in justification." (61a-62a, n. 56).

We submit that the Court of Appeals' theory as to why this Court decided the burden of proof issue as it did in *Fleetwood* is utterly without foundation. Indeed, that rationalization is refuted by the opinion, which states its own reason: "such proof * * * relates to justification". "[J]ustification" is synonymous with defense, as to which the risk of nonpersuasion has traditionally been placed on the defendant. This Court patently intended the employer to bear the risk of nonpersuasion that his "claim" of "business justification" was both "legitimate and substantial." 389 U.S. at 379, 381.

The burden of proof rule approved below, as the District Judge himself recognized (105-107a), is a departure from the settled rule in Labor Board pro-

ceedings.²³ Even if the Court of Appeals' reading of *Fleetwood* were plausible, this Court should resolve the issue because of its great importance in the administration of the Act. Where the burden of persuasion lies potentially affects every case under §§ 8 (a)(1) and (3) in which the employer asserts a "legitimate and substantial business justification" for denying rights under the Act, "for 'it is plain that where the burden of proof lies may be decisive of the outcome.'" *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965), following *Speiser v. Randall*, 357 U.S. 513, 525 (1958).²⁴ In this case, if the Board had applied the proper burden of proof rule, it would have been less likely to have overlooked such deficiencies as respondent's failure to offer any justification for underpopulating the machine shop until after the settlement agreement expired (24a, p. 8, n. 5, *supra*).

III. IN AFFIRMING THE BOARD'S ORDER, THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION.

The decision below violates each of the three limitations of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943);

²³ Judge Clarie held, erroneously we submit, that a district court is not required by *Lincoln Mills* to follow what he correctly considered the Board rule (106a-107a). The Board then, *sub silentio*, overturned its own historic rule in favor of the erroneous rule Judge Clarie enunciated for Section 301 cases (219a).

²⁴ This same proposition makes unavailing the Court of Appeals' statement: "Furthermore the Board's findings reveal that this was not a case in which the placement of the ultimate burden of persuasion was decisive of the outcome" (62a). Those "findings" are not identified. Moreover, for the Court to speculate what decision the Board would have reached if it had reallocated the burden of proof as required by *Fleetwood*, was to enter the domain of the Board's fact finding function, in contravention of settled principles of judicial review. See p. 36, *infra*.

332 U.S. 194 (1947): (1) that an appellate court must judge the propriety of agency action "solely by the grounds invoked by the agency" (332 U.S. at 196); (2) that it may not "guess at the theory underlying the agency's action" (*id.*, at 196-197), and (3) that it may not prohibit "retroactivity" in areas of "first impression" (*id.*, at 202-203). This pervasive departure from the appropriate course of judicial review calls for exercise of this Court's supervisory powers, quite apart from the intrinsic importance of the substantive rights at stake.

A. As detailed in the Statement, the Board's refusal to accord *Fleetwood* rights to these strikers did not rest upon the theory that *Fleetwood* should not be given retroactive effect in this proceeding. The Board did not even mention *Fleetwood*. Moreover, its discussion of the fact that *Laidlaw* overruled *Atlas*, *Brown & Root*, etc., was not directed to the propriety of denying *Fleetwood* rights retrospective application. Such denial would have been totally inconsistent with the Board's philosophy and practice, as exemplified in *Laidlaw* itself. Rather, the Board referred to the overruled decisions (as to *Borg-Warner*, see p. 10, n. 8, *supra*), only as an element of its waiver rationale. When the Court of Appeals properly rejected the entire waiver theory, it was "powerless to affirm the [Board's] action by substituting" (332 U.S. at 196), the theory that retrospectivity would be "unjust" because the Company had reasonable grounds to believe that its conduct was lawful. The Court of Appeals therein violated the first of the three teachings of *Chenery*.

The court below also violated the third teaching of *Chenery* when it held: "Whether to give retroactive

effect to administrative rules promulgated in agency adjudication is a question of law, and reviewing courts are not obligated to grant any deference to the agency decision" (55a, n. 48). Since the court admitted that the temporary complement depression defense was an issue of first impression when the Company acted (55a-56a), it was powerless to prohibit retrospective application of *Fleetwood* rights.

B. The majority of the Board, like the Trial Examiner, never explained why terminating unrecalled strikers' "employee" status on January 3, 1961, when the Company needed immediately to fill jobs for which they were qualified, advertising for help in the newspapers and repopulating the complements predominantly with outsiders (the ratio was 6-1 at Pratt & Whitney and more than 2-1 at Hamilton Standard), was not, as the dissenters maintained (243a), "inherently destructive" of strikers' rights as applicants for employment, and discriminatorily motivated in violation of *Mackay Radio*, 304 U.S. 333, 346 (1938). Surely, such conduct "inherently * * * discourages union membership" within the principle of *Radio Officers v. Labor Board*, 347 U.S. 17, 45 (1954).

That issue was touched upon in the opinions of the Trial Examiner and the Board, if at all, only in a single sentence of the Trial Examiner's decision:

"[T]he evidence offered by the general counsel and charging parties is insufficient to find a pattern of discrimination against all employees named and listed in the complaint." (58a, quoting 405a).

That *ipse dixit*, to which the Board added nothing, is too cryptic to comply with *Chenery's* second re-

quirement—"clarity" in agency rationale—in any case. *A fortiori* is it inadequate where, as we demonstrate below, the result is irreconcilable with other Board decisions. Apparent inconsistency requires the agency to provide "articulated reasons for the decisions in and distinction among these cases, * * *" absent which "the Board's action * * * cannot be properly reviewed" (*Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 442-443, and see the discussion of *Chenery*, *id.*, at 444).

In *Laidlaw*, 171 NLRB 1366, 1367 (col. 2) (1968), the Board held, as an alternative ground for decision, that the employer had violated strikers' rights as applicants for employment by its "failure to recall the older employees with long experience while at the same time advertising for new help to fill vacancies." It declared also that inasmuch as the Company "brought forward no evidence of business justification for refusing to reinstate these experienced employees while continuing to advertise for and hire new unskilled employees" its "conduct was inherently destructive of employee rights" (*ibid.*, at 1369 (col. 1)). It said that an "employer's preference for strangers over tested and competent employees is sufficient basis for inferring * * * antiunion motivation." (*Ibid.*, at 1369, n. 14), affirmed on this point 414 F.2d 99, 106 (7 Cir.). In *Laher Spring and Electric Car Co.*, 192 NLRB 464, decided on the same day as *United Aircraft*, the Board also found a *prima facie* case of illegal motivation established by the employer's "preference for outsiders" over those strikers whom it did not re-employ. The rule of *Laidlaw* and *Laher* has been followed: in *Fire Alert Co.*, 207 NLRB 885, 886 (1973), the Board held: "The discrimination

against [strikers considered as applicants for employment] is proven * * * for Respondent bypassed its own qualified employees who remained unreinstated in favor of new hires off the street."

The Court of Appeals compounded its error by introducing a rationale of its own for discounting the discrimination, again violating the first *Chenery* principle. The court reasoned that discriminatory motivation was negated because a greater percentage of applying strikers than of applying non-strikers was hired (58a). But this comparison is irrelevant as a matter of law, since the strikers and the other applicants were not otherwise equal. The strikers were all "tested and competent" (*Laidlaw*, *supra*), whereas the other applicants were at best "strangers" (*id.*). Moreover, none of the strangers who were *not* hired were shown to have been qualified. Thus, whereas hundreds of qualified strikers were not reemployed, for aught that appears no *qualified* stranger was denied a job. The comparison, therefore, "sheds no light whatsoever upon the dispute * * *." *United States v. Hazelwood School District*, — F.2d — (8 Cir., 1976), 12 F.E.P. Cases, 1161, 1166.

C. Lastly, the court violated the second precept of *Chenery* in affirming dismissal of the allegation that temporary complement depression was illegally motivated.²⁵ For, here again, the Board's findings are inadequate to explain why it reached the opposite result from that it reached on the same day in *Laher*, 192

²⁵ This error, like the error in allocation of the burden of proof, discussed in point II *supra*, requires a remand to the Board. As noted earlier, the court's statement that the Board's findings justify dismissal regardless of how the burden of proof is allocated violates the first principle of *Chenery*.

NLRB 464, where temporary complement depression *was* held discriminatorily motivated. The two circumstances deemed most compelling in *Laher*—complement reduction during the settlement agreement period followed by a “dramatic increase in new hires after the preferential period” and a “substantial increase” in overtime during the preferential period (192 NLRB at 465)—are likewise present here. The irreconcilability of *Laher* and *United Aircraft* was stressed by petitioners on appeal, but it was wholly disregarded by the court.²⁶

²⁶ As we develop in the companion petition, the appellate court’s analysis differed in material respects from that of the district court. The Board accepted the district court’s reasoning as masterful. While the Court of Appeals had authority to substitute its own views for those of the district court, the first *Chenery* principle expressly denies it comparable authority with respect to the Board (318 U.S. at 88).

CONCLUSION

The integrity of Congress’ “repeated solicitude for the right to strike” (*Erie Resistor*, 373 U.S. at 233-234) is at stake in this case. Over fifteen hundred strikers have been refused protection of rights which Congress gave them. Passage of time has not dulled the importance of vindication of those rights. The rebuff flouts established principles of jurisprudence, labor law and administrative law. This petition should be granted.

Respectfully submitted,

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APPENDIX A

**NEW HIRES 1/1-5/1/61 INTO OCCUPATIONAL CODES OF
REGISTERED STRIKERS AWAITING RECALL AS OF 12/31/60**

	Total New Hires 1/1-5/1	Reg. Stkrs. Hired As New Emps.	Non- Reg. Stkrs. Hired	No. of Reg. Stkrs. Awaiting Recall To Occ. Codes Where New Hires Made	Total Hires Into Occ. Codes of Reg. Stkrs. Awaiting Recall 12/30/60	Reg. Stkrs. Hired Into Old Job	Reg. Stkrs. Hired Into Diff. Job	Reg. Stkrs. Hired As Trainees
P.&W.	1893	276	1617	665	1471	74	192	42
H.S.	614	173	441	537	416	44	129	

APPENDIX B

Company Concealment of Depressed Complement and Attribution of Job Unavailability Entirely to Presence of Replacements.

On September 20, 1960, Company counsel told the arbitration panel of retired Connecticut Supreme Court Justices who were hearing the cases of the fifty strikers charged with strike misconduct (4a; J.A. 2282) that the reason registered strikers had not been recalled was

"that to make room for them we would have to fire the people we hired during the strike * * *. At Broad Brook and Windsor Locks there are approximately a thousand people who have been replaced. We have hired a thousand people during the strike, which means there are approximately a thousand people out of work who had been working there before." (J.A. 2295, 2296)

The facts were otherwise. Hamilton had hired only 676 employees during the strike (J.A. 2313), and by September 1, there had been 217 terminations (J.A. 2309). As of September 1, 541 of the 1,000 unrecalled strikers were out due to complement depression, not the presence of "replacements." By September 30, there had been 51 more terminations and there were 175 more in October-December, 1960 (J.A. 2309).

On November 18, 1960, United Aircraft's Personnel Director, Mooney, informed Lodge 1746 by letter that there were "more than 18,000 employees currently in the bargaining unit" (J.A. 1976), although in fact there were only 14,834 "active" employees (J.A. 2335—1,166 fewer than the 16,000 normally in the unit (J.A. 1975). Even counting the 1,086 unrecalled registered strikers (J.A. 2320), the total comes only to 15,920. On December 10, 1962, Company counsel represented to the district court in oral argument in the companion case:

"I am advised that on December 31 we had more employees than we had before the strike." (J.A. 1935, emphasis added.)

In fact, it had 14,897 (J.A. 2335), "significantly" fewer (13a).

On August 21, 1963, Pratt & Whitney Personnel Manager Morse testified before the Trial Examiner in this case that there were "slightly more people on the payroll at the end of phase one [approximately September 5] than we had before the strike took place." (J.A. 1946). However, there were only 15,362 on the payroll on September 1, compared with 16,104 on June 7, 1960 (J.A. 2335). In making his calculations, Morse had omitted the 1,127 terminations from the beginning of the strike to September 1 (J.A. 2308).

As late as June 8, 1964, Company counsel in oral argument in the district court denied that: "there was a smaller work force after the strike than before the strike." (J.A. 1940-1941).

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

No. _____

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

**APPENDIX TO PETITIONS FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 408, 409, 410, 411, 412—September Term, 1974.
(Argued November 25, 1974 Decided September 9, 1975.)
Docket Nos. 72-1936, 72-1937, 72-2072, 72-1935, 72-2310

Nos. 72-1936, 72-1937, 72-2027
LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiffs-Appellants-Appellees,

v.

UNITED AIRCRAFT CORPORATION,
Defendant-Appellee-Appellant.

No. 72-1935
LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 72-2310

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

UNITED AIRCRAFT CORPORATION,

Respondent,

and

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,*Intervenors.*

Before:

CLARK,* *Associate Justice,*
MOORE and TIMBERS, *Circuit Judges.*

Nos. 72-1936, 72-1937, and 72-2027 are cross appeals from a judgment of the United States District Court for the District of Connecticut, Emmet T. Clarie, *Chief Judge*, in an action brought under section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (1970), alleging breaches of two collective bargaining agreements pertaining to the reinstatement of strikers after a 1960 strike at four Connecticut plants of United Aircraft Corporation.

Affirmed in part and remanded.

Nos. 72-1936 and 72-2310 are respectively a petition for enforcement and a petition for review of an order of the National Labor Relations Board dealing mainly with unfair

* Associate Justice, United States Supreme Court, Retired, sitting by designation.

labor practice charges arising out of the same 1960 strike at United Aircraft Corporation.

Petition for enforcement granted in part, petition for review granted in part, and remanded.

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JOSEPH C. WELLS, Washington, D.C. (Michael J. Bartlett, Guy Farmer, John A. McGuinn, Patterson, Belknap, Farmer & Shibley, Washington, D.C., on the Brief), *for Appellee in Nos. 72-1936 and 72-1937, Appellant in No. 72-2072, and Respondent in No. 72-2310.*

MARION GRIFFIN, Attorney, NLRB, Washington, D.C. (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, on the Brief), *for Petitioner in No. 72-1935, and Respondent in No. 72-2310.*

MOORE, *Circuit Judge:*

This extraordinarily protracted litigation is the unfortunate aftermath of a labor strike that commenced some fifteen years ago. Lodge 743, International Association of Machinists and Aerospace Workers, AFL-CIO, is the

collective bargaining agent for employees at the Windsor Locks and Broad Brook plants of the Hamilton Standard Division of United Aircraft Corporation; Lodge 1746 represents workers at the East Hartford and Manchester plants of the Pratt & Whitney Aircraft Division of the same Company. These two Lodges will be referred to collectively as the "Union." Pratt & Whitney engages primarily in the manufacture of aircraft engines; Hamilton Standard manufactures primarily aircraft propellers, aircraft engine fuel controls and air conditioning systems, and electronic components, controls and related items. In 1960, when the principal events involved in this litigation transpired, the four plants together employed nearly 20,000 people.

On June 8, 1960, the Union struck these four plants (The International Association struck at other United Aircraft plants in the State of Connecticut as well) over demands sought to be included in a new collective bargaining agreement. The strike lasted nine weeks and was marked by extreme violence and mutual antipathy.¹ It was not settled until Abraham Ribicoff, the Governor of Connecticut, had intervened in an effort to induce the parties to reach an accommodation.

As the basis of the strike settlement, the Company and the Union reached accord on new collective bargaining contracts covering workers at the four plants and also agreed to submit to arbitration the cases of 50 strikers accused of serious misconduct. In addition, they agreed on a procedure to govern the recall of strikers to jobs at the four plants. The terms of this agreement were set down in writing by the Company and became embodied

¹ Strike-related violence caused the Company to file a suit in State court, eventually leading to a judgment in its favor. *United Aircraft Corp. v. Machinists*, 161 Conn. 79, 285 A.2d 330 (1971), cert. denied, 404 U.S. 1016 (1972).

in two similar although not wholly identical documents, one covering employees of Pratt & Whitney and the other employees of Hamilton Standard. These documents, each denominated in its caption as a "Strike Settlement Agreement" (herein sometimes termed the "recall" Agreements), are the root of these cases.

Being totally dissatisfied with what ensued with respect to the recall Agreements, the Union sought two avenues of redress. Commencing in November 1960, the Union filed with the NLRB a battery of unfair labor practice charges relating mainly to the Company's allegedly unlawful administration of the recall Agreements and its refusals to supply the Union with certain requested information. On February 7, 1963, the General Counsel of the NLRB issued a consolidated complaint based on the Union's charges. A hearing before a Trial Examiner commenced in 1963 and lasted, with numerous intermittent recesses, until June 1968.

In the meantime, the Union had also filed suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, in the United States District Court for the District of Connecticut.² The complaints (two suits were eventually consolidated for trial), filed December 11, 1961, alleged breach of the Strike Settlement Agreements and sought specific performance as well as substantial monetary damages. The case ground through discovery, several interlocutory rulings, and a 4½ month trial, and on March 20, 1969, the district court issued a lengthy decision (reported at 299 F.Supp. 877) largely in favor of the defendant, although it did find that the Company breached the agreements in some limited respects. The case then

² The filing of a suit under section 301 does not oust the jurisdiction of the NLRB to hear unfair labor practice charges arising out of the same conduct. *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). However, there may be no double recovery. See *UAW v. Russell*, 356 U.S. 634, 646 (1958).

proceeded through a determination of the question of damages to final judgment dated June 16, 1972. The judgment incorporated by reference the findings of fact and conclusions of law set forth in the Court's opinion (Memorandum of Decision filed March 20, 1969) and, more specifically as to damages, directed the defendant to pay to plaintiff Lodge 743 and plaintiff Lodge 1746 for distribution to beneficiaries, identified in an appendix annexed to the judgment, amounts described as "Net Monetary Damages" plus interest at 6% from March 20, 1972 (the date of the opinion) except for a deduction therefrom of 15% of the amounts stated which percent was to be paid to the unions for the benefit of retained counsel in the litigation. Other items by way of payment to unemployment compensation and pension funds as well as other employee adjustments were specified.

Claims of all employees except 72 specified in the Appendix were denied and the complaint was dismissed as to them. Legal taxable costs were awarded to plaintiffs.

Four categories of striker-employees held to have been prejudiced by defendant's actions were listed with the name and specific damage award, together with other benefits where appropriate. These were (a) Strikers Prejudiced by Transfers, Promotions or Demotions Into Jobs Vacated by "Summer" Employees; (b) Strikers Prejudiced by Promotions; (c) Strikers Prejudiced by Transfer of "Department 74 Trainees" and (d) Strikers Prejudiced by Lateral Transfers and Demotions From One Seniority Group to Another. The judgment of the district court has not been appealed with respect to all of these categories. *See note 25 infra.*

On July 25, 1969, the Trial Examiner handed down his ruling in the unfair labor practice proceedings. He concluded that, except in narrow areas paralleling the findings of the district court in the section 301 case, the

Company had committed no unfair labor practices in connection with the recall of strikers during the life of the Agreements. He did find, however, that the Company's treatment of unrecalled strikers following the life of the recall agreements did deny them certain rights under the National Labor Relations Act. The Examiner also dismissed Section 8(a)(5) charges that the Company had refused to bargain in good faith by withholding certain information from the Union. The other limited findings of the Trial Examiner will be considered in due course.

On review, the Board adopted the decision of the Trial Examiner with some modification, including a reversal of the Trial Examiner's ruling that the Company had denied the strikers certain rights after the expiration of the recall Agreements. *United Aircraft Corp.*, 192 NLRB 382 (1971).

From these rulings the parties seek review. The Union appeals the district court's ruling in the section 301 suit, claiming that the court erred in nearly all significant respects. The Company also cross appeals with respect to some of the matters determined adversely to it (Nos. 72-1936, 72-1937, 72-2072). In the NLRB proceedings, the Unions have petitioned for review and the Board has cross-petitioned for enforcement of its order against the Company. The Union has also intervened in the enforcement proceeding (Nos. 72-1935, 72-2310).

These cases were argued together and, although dealt with separately in this opinion, are inextricably intertwined.

I. The Section 301 Suit

A. General Introduction

The Strike Settlement Agreements called for strikers desiring to return to work to express their intention by registering. Under the terms of the Agreements registra-

tion would take place at Hamilton Standard on August 9 and 10, 1960, and at Pratt & Whitney from August 11 to August 13, 1960. Strikers not registering would be treated as having quit and not desiring to return to work. Those strikers who did register would then be recalled in accordance with the provisions in the Agreements. The operative paragraphs are set out in the margin.³ The

3 The Agreement covering strikers at Hamilton Standard provided as follows:

4. Strikers who register in accordance with the above will be returned to work in the following manner:

- (a) If the job held prior to the strike (i.e., same job code, department, and shift) is available, the registering striker will be returned to that job.
- (b) If such job is not available, strikers will be recalled to comparable or other available jobs in accordance with their seniority and demonstrated ability pursuant to Article VII, Section 1 and Section 2, of the Windsor Locks contract ratified by the union on August 8, 1960, or pursuant to Article VII, Section 1, of the Broad Brook contract ratified by the union on the same date.
- (c) Strikers for whom no job is available in accordance with (a) and (b) above will be placed on a Preferred Hiring List and will be recalled to job openings which develop at any time prior to January 1, 1961, before new employees are hired. Employees on such Preferred Hiring Lists will be recalled to job openings in the order of their seniority and demonstrated ability pursuant to Article VII, Section 1 and Section 2, of the Windsor Locks contract ratified by the union on August 8, 1960, or pursuant to Article VII, Section 1, of the Broad Brook contract ratified by the union on the same date.

Separate Preferred Hiring Lists shall be established for returning strikers employed at the Windsor Locks plant and those employed at the Broad Brook plant.

For Pratt & Whitney strikers, the Agreement stated:

4. Strikers who register in accordance with the above will be returned to work in the following manner:

- (a) If the job held prior to the strike (i.e. same job code, department and shift) is available, the registering striker will be returned to that job.
- (b) If such job is not available, strikers will be treated as if they had been laid off, and will be recalled to other available

Agreements provided for recall to occur in three phases, corresponding to paragraphs 4(a), 4(b) and 4(c). Under Phase 1, strikers would be returned to their prestrike jobs (i.e. same job code, department and shift) if they were available at the end of the strike. If a striker's prestrike job was not available, under Phase 2 he would then be recalled to certain other jobs then available. Finally, under Phase 3 registered strikers not recalled up to that point would be put on a preferred hiring list and placed in jobs which developed before December 31, 1960, the expiration date of the Agreements, before new employees were hired. The order of recall under phases 2 and 3 was to be governed by the relative seniority of the strikers as provided in the collective bargaining agreements recently ratified by the Union membership as part of the strike settlement.

Pursuant to the terms of the Agreements, a total of 6,536 strikers registered for reinstatement: 4,535 registered at Pratt & Whitney (4,515 at the East Hartford plant and 20 at the Manchester plant) and 2,021 at Hamilton Standard (1,721 at Windsor Locks and 300 at Broad Brook). From that point through the life of the Agreements, reinstatement

jobs in their occupational groups and seniority areas in accordance with their seniority, pursuant to Article VII, Section 1 and Section 2, of the contract ratified by the union on August 9, 1960.

- (c) Strikers for whom no job is available in accordance with (a) and (b) above will be placed on a Preferred Hiring List and will be recalled to job openings in their occupational groups and seniority areas which develop at any time prior to January 1, 1961 before new employees are hired. Employees on such Preferred Hiring Lists will be recalled to such job openings in the order of their seniority pursuant to Article VII, Section 1 and Section 2, of the contract referred to above.

Separate Preferred Hiring Lists shall be established for returning strikers employed at the East Hartford plant and those employed at the Manchester plant.

ment proceeded generally as follows. At Pratt & Whitney 2,270 registered strikers returned to their identical pre-strike jobs under Phase 1, and 793 returned to other jobs under the provisions governing Phase 2. Both of these steps had been substantially completed by early September 1960. The remaining strikers were notified that they had been placed on a preferred hiring list, and from this group 407 were recalled prior to the expiration of the Agreements. Thus, of a total of 4,535 registered strikers at Pratt & Whitney, 3,470 had been returned to work. Of the remaining 1,065 registered strikers, 223 had been removed from the preferred hiring list for other reasons (e.g. resignation), and therefore 842 strikers remained on the list and had not been hired by January 1. 119 of these individuals had been offered jobs and either refused the offer or failed to meet the physical requirements.

At the Hamilton Standard plants as well, substantial numbers of strikers remained unrecalled when the Agreements expired. The Company recalled 753 strikers under Phase 1 and 104 under Phase 2. An additional 223 returned to jobs by being drawn off the preferred hiring list under Phase 3, leaving 941 strikers who had not been recalled pursuant to the Agreements. Taking account of resignations, etc., 843 remained on the preferred hiring list, 4 of whom had been offered jobs but who had declined to accept.

In total, therefore, 1,562 (723 plus 839) employees desiring to return to work out of more than 6,500 registered strikers failed to receive offers of reinstatement under the Agreements. Some of these employees (278 at Pratt & Whitney and 177 at Hamilton Standard) were hired by the Company, during the first few months of 1961, but their status was then that of new employees, and they had lost accrued seniority and its attendant benefits. From the Union's standpoint, this level of reinstatement was wholly

unsatisfactory, and it is these figures which formed the motivation for the charge that the Company's procedures breached the recall Agreements. According to the Union, the Company employed a variety of tactics designed to minimize the number of jobs available to registered strikers. Chief among these alleged artifices was a plan to depress the complement at the plants until after the Agreements had expired. Included as well were promotions and transfers of active employees to vacancies in preference to reinstatement of strikers awaiting recall. As noted, the district court rejected nearly all of the Union's contentions.

It is important to recognize that the aggregate figures set out above provide a broad and somewhat oversimplified picture of the recall process. The plants involved were not simple units in which all jobs were completely interchangeable. For administrative purposes plants were divided into separate seniority groups known as "seniority areas," and an employee's seniority (length of continuous service with the company) operated only within his seniority area. At Pratt & Whitney types of job skills were classified into "occupational groups." Hamilton Standard collective bargaining contracts did not utilize the term "occupational group" but substituted the concept of "demonstrated ability" (previous experience in a job that had shown his ability in it). The recall Agreements incorporated this organizational structure, and limited⁴ the recall rights of

⁴ This interpretation of the Agreements is not undisputed. The Union claims that it is inconsistent with certain representations and commitments made by the Company during the negotiations. It argues that once the list of registered strikers for a particular seniority area and occupational group had been exhausted, strikers awaiting recall in other seniority areas and occupational groups should have been recalled. However, we think that the language of the Agreement is unambiguous with respect to the extent of the preference they accorded strikers, and any

strikers to available jobs and jobs which developed "in their occupational groups and seniority areas" (at Pratt & Whitney) and to jobs in which they had "demonstrated ability" (at Hamilton Standard). Thus, the mere existence of a job vacancy at one of the plants did not automatically mean that a striker had a right to fill the job. If, for example, the vacancy occurred in a seniority area and occupational group for which no strikers were awaiting recall, the Company was entitled under the terms of the Agreements to hire new employees, and in fact this did occur.

At this point it is appropriate to consider the standard of review that governs our disposition of this appeal. This was a non-jury contracts case, albeit an exceptionally complicated one made more complex by the necessity of interpreting the contract with a view toward "the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Under Rule 52(a) of the Federal Rules of Civil Procedure, we are bound by the factual findings of the district judge unless they are clearly erroneous. And although the district court's interpretation of the contract involves a question of law and is fully reviewable, to the extent that the interpretation depends upon extrinsic facts, we are bound by the findings of the lower court with respect to such facts. *See generally* C. Wright & A. Miller, 9 FEDERAL PRACTICE AND PROCEDURE §2588 at 750-51 (1971).

Besides contending that some of the district court's findings are clearly erroneous, at various points throughout

extension of the plain language by implication would be wholly unwarranted.

Nor is this interpretation inconsistent with the directive of *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 381 (1967), that economic strikers are entitled to be reinstated when a job opens which they are "qualified" to fill. The use of occupational groups and demonstrated ability as reinstatement criteria can reasonably be said to accord with this mandate.

its main brief the Union cites failures of the district court to make specified findings. But it must be remembered that the measure of the district court's duty is not the contentions of the parties.

One function of findings of fact is to aid the reviewing court. *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 628 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). And if they are sufficiently comprehensive to disclose the steps by which the trial court reached its ultimate conclusion on the factual issues, the findings are adequate. C. Wright & A. Miller, *supra*, §2579. In this case, perusal of the voluminous record coupled with a glance at the lengthy opinion of the district court reveals the diligence of the district judge and the detailed nature of his findings. That he may have failed to make each and every finding that the parties may deem pertinent is in itself no sign of error.

B. Complement Depression

It is an irrefutable fact that during the life of the recall Agreements the total work complement at all Company plants except Manchester (having a total pre-strike complement of only 133 employees) remained significantly below pre-strike levels. Furthermore, there is no question that starting almost immediately after the expiration of the agreements on December 31, 1960, the Company hired significant numbers of new employees, thereby bringing complements up to pre-strike size within several months. The Union contends that the Company deliberately kept the complements at artificially low levels. This alleged tactic, it claims, had the effect of denying reinstatement to some of the strikers, thereby reducing overall labor costs when the Company hired new (and lower paid) employees after January 1, 1961. The district court addressed much of its opinion to the issue of complement depression, concluding that:

[T]he plaintiffs have failed to prove their allegations that the defendant, or either of its subsidiaries, deliberately and in bad faith depressed the bargaining unit during the life of the Settlement Agreements through December 31, 1960 or that it failed to exercise good faith in the performance of the Strike Settlement Agreements to avoid its contractual obligations. While the plaintiffs placed this question in issue by a *prima facie* showing, the defendant assumed its burden of going forward and advanced proof which satisfied the Court, that it had acted in good faith and was motivated by legitimate and substantial business justification in the performance of its obligations under the Strike Settlement Agreements.

299 F.Supp. at 912 (footnote omitted). The Union takes issue with these findings and contends, in addition, that even if the Company did not administer the Agreements in *bad faith* it was nevertheless obligated by the Agreements to restore the complements to pre-strike size. We consider first the nature of the Company's obligations under the contract.

1. Restoration of Full Complements

The district court did not expressly decide whether embodied in the Settlement Agreements was a commitment that the pre-strike complements would be restored, but its opinion acknowledged the issue and by implication rejected the contention. *See* 299 F.Supp. at 897.

The gist of the Union's argument is that the terms "available" jobs and job openings "which develop" referred respectively to jobs that were not filled by replacements at the end of the strike and to jobs that were

occupied at the end of the strike but subsequently vacated by employee terminations. In essence, the contention is that these definitions precluded temporarily reduced complements as a basis for denying jobs to strikers. At least beyond the first few weeks of the settlement, according to the Union, the Agreements took no account of strike dislocations and potential difficulties in the resumption of full production.

The principal basis for this position is the presettlement negotiations between officials of the Company and representatives of the Union. Throughout the talks the Union remained acutely aware of the Company's continuing program of hiring replacements. A principal area of discussion was the number of strikers who would not be reinstated, and Union negotiators requested Martin F. Burke, United Aircraft's Vice President for Industrial Relations, to venture estimates on the number of strikers who would not be returned to work. Burke guessed that between 400 and 500 strikers at Hamilton Standard would have no jobs at the expiration of the strike. At Pratt & Whitney, Burke estimated⁵ that the number would be larger.⁶ These estimates were admittedly based on the assump-

⁵ At a previous meeting on August 5, 1960, with Mr. Hayes, the president of the International Union, Burke estimated that 600 strikers would lose their jobs at Pratt & Whitney. The estimates referred to in the text occurred at a meeting on the following day.

The parties hotly dispute whether these estimates were intended to refer to the number of strikers not "immediately" reinstated (i.e. by approximately the first week of September) or alternatively to those who would not be reinstated by December 31, 1960, at the expiration of the agreements. There is support for both positions; the district court evidently found the former to be accurate. 299 F.Supp. at 883. We do not dispute that finding, although, like the district court, we do not attach much significance to Burke's estimates. He repeatedly stressed that it was very difficult to make any estimate, and hence his "guesses" must be deemed little more than just that.

⁶ Joint Appendix 296, 302.

tion that the plants would again operate at pre-strike complements. But it does not follow that because the number of replacements was of utmost concern to the Union and the existence of replacements was often discussed as the reason why strikers would not be reinstated, that the Agreements cast aside all business considerations. Indeed, such a construction would be extraordinary since it would require an employer to operate without regard to the necessity of gearing employee levels to output requirements or efficiency. And in fact there are indications in the record that the production requirements of the Company would be a factor in determining the level of striker reinstatement. In discussing the proposed terms of the recall Agreements with International Union President Hayes, Burke explained that the "filling out of any complement that [the Company] needed" would be from the preferred hiring list.⁷ At another point, Burke told Hayes that it was the Company's intention to reinstate strikers "as quickly as possible, and take into account the production problem."⁸ Thus, strike-related production problems were expressly within the contemplation of the parties, although they could not foresee the extent and duration of the reduced complements. In fact, the Union acknowledges as much but seeks to avoid undermining its interpretation of the Agreements by asserting that "[a]t no time did Burke indicate that 'the production problem' would take more than 'a few weeks' to solve"⁹ But this does not diminish the fact that the Agreements were made under the assumption that business considerations might prevent reinstatement of some strikers, al-

7 *Id.* 1151.

8 *Id.* 1755, 1169-70.

9 Appellant's Brief at 45.

beit temporarily. That is to say, their jobs would not be "available" within the meaning of the Agreements.

That there was not full discussion of temporary cut-backs in employment levels at the plants hardly seems surprising. There were no plans permanently to abolish jobs,¹⁰ and resuming full production as quickly as possible would seem to benefit both the Union and the Company. Thus, their interests would normally not diverge on this point, and post-strike production levels would understandably not be a focal point in negotiations.

Accordingly, we must reject the contention that the Agreements contained an implied obligation to restore full complements. And contrary to the assertions of the Union, this interpretation neither leaves the reinstatement rights of strikers to the untrammelled discretion of the Company nor is inconsistent with national labor policy. The Company was required to exercise good faith in its performance under the Agreements. It could not at its whim keep the complement below pre-strike levels; nor could it do so in order to discriminate against strikers. Rather, the Company could refuse to reinstate strikers only for legitimate and substantial business reasons unrelated to labor relations. See *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967). We turn now to consider whether the district court was correct in concluding that the Company's maintenance of the complements at reduced size met these criteria.

2. The Administration of the Agreements

As noted above, after considering "the totality of the circumstances", the district court found that the Company

10 In July 1960 the Company had predicted that about 65 jobs would be abolished at Hamilton Standard's Broad Brook plant. (Joint Appendix 2340) However, this subject was never repeated when negotiations resumed.

had not in bad faith depressed the complements during the life of the Agreements. Although the court acknowledged that the Union had made out a *prima facie* case of bad faith, the Company successfully rebutted this showing, satisfying the court that it had been motivated by legitimate and substantial business considerations. 299 F. Supp. at 912. The Union now attacks that finding as clearly erroneous. It assails the failure of the district court to make express findings on subsidiary matters deemed by the Union to be crucial; and where the court did detail such findings, the Union contends that its determination is contradicted by other and more believable evidence that the court supposedly ignored. As demonstrated in the following discussion, we cannot agree that the district court was in error.

At both Hamilton Standard and Pratt & Whitney the district court found that strike-caused production imbalances, consisting mainly of parts shortage bottlenecks, were the principal reason for reduced employee complements.¹¹ The Union contends that this finding cannot stand. It relies heavily on the minutes of the August, September, and October 1960 meetings of the respective Operating Committees of Hamilton Standard and Pratt & Whitney as showing the existence of a "plan" to keep complements depressed until after the expiration of Agreements. The existence of such a plan, the Union contends,

¹¹ Contrary to the contention of the Unions, we do not read the district court's opinion as attributing company employment policies to a desire to maximize profits in 1960, at the expense of overall profitability, by minimizing labor costs to the end of the year. Any such policy on the part of the Company would make little economic sense since labor is the means with which it generates profits. Thus, to avoid hiring people where they could be productively utilized would hardly promote profitability. As we read the pertinent portion of its opinion, the district court was merely observing that business considerations including profit considerations govern the level of employment.

it inconsistent with any explanation based on parts shortages.

The district court found little significance in the minutes, *see* 299 F.Supp. at 908, and we wholly concur in this assessment. A study of the minutes shows that they cannot reasonably support the Union's theory of a plan to depress the complements, much less one conceived in bad faith as a retaliatory measure against the registered strikers. For example, at Pratt & Whitney, Mr. L. C. Mallett, the Chairman of the Operating Committee, admonished department heads to keep expenses at a minimum in order to remain within operating budgets.¹² Mallett's comments appear to reflect nothing more than a generalized corporate concern over minimizing costs and thus insuring profitability. Moreover, there is no indication that his remarks were aimed specifically at the East Hartford plant, the only one where complements remained below pre-strike levels, but rather were directed at all units within the division.

Such discussions, as the minutes reveal took place, concerned the reinstatement of strikers and were nothing more than forecasts of the number of strikers who would be recalled to work in light of the projected manpower needs of the plants. On August 15, 1960, for example, N. B. Morse, personnel manager at Pratt & Whitney, reported that approximately 3,000 of 4,500 registered strikers were back at work and that it was expected that 300-400 more would be recalled before the end of the year.¹³ About a month later, Morse again reported that there would most probably be no openings before the end of the year for the approximately 1,200 registered strikers.¹⁴ The Hamilton Standard

¹² Joint Appendix 2347, 2349.

¹³ *Id.* 2350.

¹⁴ *Id.* 2352.

minutes, although slightly more suggestive, also cannot support an inference of bad faith. The minutes of the August 23, 1960, meeting reveal that "[p]roduction workers totaled 1,750 prior to the strike and the factory intends to hold employment to 1,600 on a 3-shift operation to avoid a 1961 layoff. This will require 20% overtime during 1960."¹⁵ However, the context of the statement reveals that the employment level was dictated by strike-related business disruptions and a parts inventory imbalance. To the extent that this might be considered a "plan" to depress the complement rather than simply a projection of manpower needs, it was one based on business considerations and thus cannot be considered violative of the Agreement. It is clear that there existed no overriding concern with the extent of striker reinstatement; employment levels were not the tail that wagged the dog. Rather, projections were based upon anticipated business conditions.

In contrast to the allegations of the Union, the Operating Minutes are actually supportive of the Company's position that business exigencies kept complements below pre-strike levels. The minutes of the September 19, 1960, meeting at Pratt & Whitney show that the post-strike efficiency of the machine shop at the East Hartford plant was poor, resulting in a "disappointing" level of parts deliveries.¹⁶ The Hamilton Standard minutes for the October 18, 1960, meeting also refer to a "parts deficiency" occurring as a direct consequence of the strike. These were in fact the principal grounds for the district court's conclusion that the Company acted in good faith throughout the recall period.

Although reliance on the Operating Committee minutes is misplaced, the Union does not limit itself to that argu-

¹⁵ *Id.* 2356.

¹⁶ *Id.* 2350.

ment. It contends that quite apart from the existence of any plan, the parts shortage explanation does not hold up under scrutiny. It cannot account for either the pattern of employment during the period of the Agreements—complements at both divisions rather than gradually growing peaked at about Labor Day and thereafter continuously declined (at Hamilton Standard) or at least failed to regain that level before December 31, 1960 (at Pratt & Whitney)—or for the hiring surge that occurred after January 1, 1961.

At this point a brief summary of the principal evidence relied on by the district court is required. To maintain some level of production during the strike, Hamilton Standard subcontracted some 265,000 man-hours of work to 22 different firms. In this connection, it also loaned out to the subcontractors the equipment and machinery necessary to accomplish this work. These contracts could not be cancelled immediately upon conclusion of the strike without subjecting the Company to liability for breach of contract. Furthermore, Hamilton Standard could not accept only partially completed goods without releasing the subcontractor from responsibility for defects. These circumstances led to an unbalanced flow of materials that inhibited the return to normal production. Witnesses from Hamilton Standard testified that for this and other reasons there was considerable disruption in the shop; some parts were in short supply, and others were not. The complexities of the situation were such that the production controls systems were unable to cope with them.¹⁷ To combat these difficulties, stop-gap measures were employed that were perhaps detrimental from the long range standpoint of getting back to normal operations but nevertheless served the immediate need of eliminating production bottle-

¹⁷ *Id.* 591-92.

needs. Overtime was utilized where it would be most efficient to continue production with workers already familiar with the particular processes involved and it was anticipated that the need would be temporary in nature.

Besides testifying about Hamilton Standard's production problems, these witnesses denied knowledge either of the existence of a plan to avoid hiring employees until after December 31, 1960, or of a policy of utilizing overtime as a substitute for additional manpower where the need was expected to be permanent. In large part the issue boiled down to a matter of credibility, and the district court could not have helped but be fully aware of the Union's allegations of bad faith and the motivation for Company representatives to distort the truth. But the court apparently credited this testimony, and on the record before us, we are not inclined to upset that finding. Although the Union points to testimony from Company witnesses indicating that parts problems improved progressively throughout the Agreement period, and assert that this admission is inconsistent with the declining complement during the same period, we are not convinced that the contrast exposes a fallacy in the parts shortage explanation. A progressively improving situation would not immediately translate itself into a greater need for employees. Solution of difficulties in a single limited area, although contributing to an overall solution of production problems, would by itself add little of significance. That a single part is added to a fuel control, for example, would put that device a step closer to completion, but it still would not make the control ready for testing or shipping.¹⁸

Furthermore, there is ample evidence in the record to support the district court's conclusion that the increased hiring at Hamilton Standard in early 1961 was prompted

¹⁸ See *id.* 608-10.

by business considerations and was not merely the result of the expiration of the Agreement and the concurrent abolition of the preferred hiring list. Hamilton Standard first publicly indicated the existence of job openings for about 400 skilled machinists and technicians in a press release on January 6, 1961. On the previous day it had also sent letters to registered strikers who had not been recalled inviting them to apply for the openings. Although the speed with which these announcements followed the expiration of the Agreements makes Hamilton Standard's motives suspect, there were other reasons behind the hiring. On December 21, 1960, Hamilton had received a pilot order for full controls for the Pratt & Whitney engines powering the Boeing 727. Although the order initially involved only 6-8 controls, development of such a control requires a great deal of skilled work.¹⁹ It was also hoped that the initial pilot order would lead to more sales, making the initial development phases worthwhile. Hamilton was also in the beginning phases of production and experiencing pressure to get moving on other equipment including a JFC26 control for a General Electric engine, and a complex, highly classified system for a Pratt & Whitney engine.²⁰ These factors were all noted by the district court and evidently formed the basis for a conclusion that there were business reasons to undertake hiring of new employees in early 1961. Coupled with the Company's explanation for the level of employment during the Agreement, they provide an adequate basis for the ultimate finding that complements at Hamilton Standard were not depressed in bad faith.

At Pratt & Whitney the explanation for reduced employment levels was similar. During the strike, the Company

¹⁹ *Id.* 572-73.

²⁰ *Id.* 567-68, 587-88.

sought to complete manufacture of engines that had been in the latter stages of production and to continue deliveries insofar as possible. This policy resulted in production line disruption and parts shortages as materials were pulled out of earlier stages in the production line and already-manufactured parts were utilized but not replaced. Thus, upon termination of the strike, return to normal production depended upon depleted supplies of parts becoming replenished. This responsibility fell upon the machine shop, the largest single section of the East Hartford plant and the section that had the task of manufacturing the parts used in the various stages of the assembly process. Without an adequate supply of all necessary parts, there would be a natural depression of the work force required in other sections of the plant. In short, the machine shop was the key to restoration of a full complement.

Prior to the strike the machine shop employed 4,820 people; on December 31, 1960, it employed 4,909, an increase of 89. Moreover, most strikers registering for recall to the machine shop were in fact recalled (1,115 of 1,296). The Company stresses these statistics as showing that it was straining to obtain an adequate supply of parts. The Union, on the other hand, points out that after an initial restaffing resulting in a peak population about Labor Day, the Machine Shop population was actually allowed to decline until December when more employees were again added. This pattern, argues the Union, coupled with a marked increase in the machine shop through the first three months of 1961, forecloses the Company's protestations that it was straining to resume full production.

The trial judge did not draw the inference of bad faith advanced by the Union. He concluded that it was not likely that the Company would repopulate the machine shop, recalling most strikers assigned to that area, if it was simultaneously embarked on a program of complement

depression. *See* 299 F.Supp. at 910. The Union's theory depends upon acceptance of the idea that the Company developed an elaborate charade to obtain an ample—but not too ample—level of production. It also ignores the fact that there may have been difficulties regaining normalcy in a section after a bitter and protracted strike, as the Operating Committee minutes reveal were present at the East Hartford Machine Shop.²¹ That the district court rejected this scenario was within its proper role as trier of fact.

The Union also complains that the trial judge made no finding which would explain the hiring of over 1,700 employees and restoration of a full complement at Pratt & Whitney during the first three months of 1961. There was testimony as to the business reasons therefor and specific findings on the subject were not indispensable. The ultimate question was whether the Company depressed the complement in bad faith during the course of the Agreements. The degree of hiring after January 1, 1961, was important only to the extent that it shed light on the motivation for Pratt & Whitney's actions during the Agreements. The district court made a detailed review of the evidence in concluding that the complement at Pratt & Whitney had not been depressed. By implication the 1961 hirings were not the inevitable result of prior breaches of the Agreements. Under these circumstances, it was not imperative that the district court detail its findings with respect to this subsidiary matter.

C. Transfers and Promotions

Throughout all three phases of the Strike Settlement Agreements, the Company's policy was to operate as if

21 *Id.* 2350.

the unrecalled registered strikers had been laid off for lack of work. In previous layoff situations the Company had continued to make promotions and transfers among its active employees, and this practice continued also during the recall period.²² A significant number of these promotions and transfers were into jobs for which registered strikers were still awaiting recall, thereby foreclosing the striker's opportunity to fill that vacancy.²³ The Company's position was that this was an inevitable consequence of following long-established procedure.

The Company's policies were summarized in a memorandum dated September 8, 1960, written by J. E. Vandervoort, personnel manager at Hamilton Standard.²⁴ The memorandum purported to set out the "ground rules" for handling recall of registered strikers during the term of the Hamilton Standard Agreement. The "ground rules" can be summarized as follows:

1. When a job became available it would be offered first to the most senior active employee who had held the same job before the strike but had returned to a different job at the end. The Company saw the need to "make whole" active employees as its first obligation.

22 A 1959 arbitration award had in dictum prohibited Hamilton Standard from transferring a worker across departmental and seniority area lines when a more senior employee was awaiting recall in the transferee's new area. Insofar as we are aware, this was the only time the Company's transfer policies had become the subject of a grievance proceeding.

23 The Union, initially at least, appears to have claimed 137 "blocking" transfers (including promotions) at Hamilton Standard and 387 such transfers at Pratt & Whitney (Joint Appendix 2389, 2390), although there are pencil notations on the pertinent exhibits, making it unclear whether the Union relied on these figures throughout the trial.

24 Although the memorandum was written at the start of Phase 3, testimony indicated that the same policies were also followed during the earlier phases of the Agreements. Joint Appendix 622-23.

2. The Company would then consider filling the vacancy by transferring another qualified employee, although this method was to be approached with caution.

3. If the job was still unfilled, Hamilton would look to the Preferred Hiring List for a qualified employee in the appropriate seniority area.

4. The Company would then look for a qualified employee from another seniority area who was on the Preferred Hiring List.

5. After these methods had been exhausted, Hamilton Standard would hire outside the Preferred Hiring list.

The initial premise of the district court was that it was proper for the Company to administer the Agreements using layoff procedures. However, not all promotions and transfers during the recall period were of precisely the same character, and the court was presented with a myriad of different situations. Although in purely numerical terms it held that most promotions and transfers were proper, it found breaches of the Agreements in instances affecting some 72 registered strikers. The parties have not appealed all of the district court's findings in this area. The Union challenges the district court's resolution of two issues: that the transfer of junior active employees to jobs for which senior registered strikers were awaiting recall did not violate the Agreements; and that promotion and transfer of apprentices to bargaining unit jobs for which registered strikers were awaiting recall did not violate the Agreements. The Company appeals the finding that promotion of junior active employees other than apprentices into jobs for which senior registered strikers were awaiting recall constituted a breach. The Company has not appealed other aspects of the dis-

trict court's judgment concerning promotions and transfers, and of course, the judgment is conclusive with respect to those matters.²⁵

The district court's point of departure on the question of promotions and transfers was that the basic intent of the Agreements was to treat registered strikers as if they had been laid off. This was the position that had been advanced by the Company, although the point was vigorously disputed by the Union. Because we are unable to accept the district court's initial premise, our view of the question is somewhat different. Neither however do we accept in its entirety the interpretation of the Agreements advocated by the Union.

The district court based its conclusion that layoff policies should govern the recall of strikers both on the language of the Agreements themselves and on the provisions of the "interlocking" collective bargaining contracts. The latter contained broad "management rights" clauses,²⁶ which reserved the Company's right to determine when transfers and promotions²⁷ should be made. Several factors per-

25 The findings regarding transfers and promotions not appealed include: that transfers across occupational group and seniority areas in preference to senior registered strikers breached the Agreements; that transfers of certain trainees into occupational groups and seniority areas where senior registered strikers were awaiting recall breached the Agreements; that the transfer of junior active employees to jobs for which registered strikers who had previously signed a waiver of their right to be recalled to another job were awaiting recall breached the Agreements; that using junior active employees to fill jobs vacated by summer hires violated the Agreements.

26 The "management rights" provision was contained in the "Witnesseth" clause in the preamble to the basic labor agreements. A "Supplemental Memorandum" executed on August 16, 1960, emphasized that management's prerogatives were not to be limited by arbitration.

27 Although the basic labor contracts contained no restriction on the right of the Company to make promotions, the contracts did specify that selections for promotions be made on the basis of "seniority, fitness, and ability of the employee" and that where employees were in all other respects equal, seniority would govern.

suade us, however, that the Strike Settlement Agreements restricted somewhat the freedom to promote and transfer that the Company might have enjoyed during a layoff. Perhaps the foremost consideration is that the situation at the conclusion of the strike was fundamentally different than a layoff. As the district court noted, during periods of layoff workers are bumped downward by more senior people whose jobs have been eliminated. See 299 F.Supp. at 917. The result, generally speaking, is that the more junior employees end up being the ones who are out of work.²⁸ In contrast, employees still out at the end of the strike presumably ranged from among the most senior to the most junior.

Nor does the language of the Strike Settlement Agreements dictate that layoff procedures regarding transfers and promotions should govern. Paragraph 4(a), for example, makes no mention of layoff, and at least initially, recall of strikers bore no relation to post-layoff recall procedures. During Phase 1 strikers were to be recalled to their old jobs, if they were available, without regard to seniority considerations that would govern after a layoff.

Only in paragraphs 4(b) and 4(c) are there any indications that layoff considerations were a factor at all. But an examination of the layoff references demonstrates that they were intended only to fix the order of recall among the registered strikers themselves. The provisions of Article VII, Sections 1 and 2 (Section 1 of the Broad Brook contract) of the respective collective bargaining contracts, referenced in paragraphs 4(b) and 4(c) of the Agreements, are very limited in scope. The operative provisions in each of the contracts is Article VII, Section 1(a). Although the precise terminology differs slightly

28 Seniority was not necessarily the sole factor in determining who would be laid off. At Hamilton Standard, demonstrated ability was also a consideration.

among the contracts so as to accommodate the varying administrative structures of the plants, the provision in the contract covering Hamilton Standard's Windsor Locks plant is illustrative:

In the case of an indefinite layoff for lack of work, employees shall be laid off from and recalled to specified seniority areas in accordance with their seniority (length of continuous service with the company since the most recent date of hire) and demonstrated ability.

Plainly, the section deals only with the order of recall among those laid off and says nothing about promotions and transfers. In this respect, an omission from the provisions of the collective bargaining contracts expressly incorporated into the Strike Settlement Agreements is significant. Article VII of the respective collective bargaining agreements also contained a clause providing in part:

Before new employees are hired in a given seniority area, the employees who are still laid off from that seniority area shall first be offered employment in that seniority area The company will give consideration to transferring back to his former job and rate an employee who was transferred to a lower-rated job within his seniority area as a result of a readjustment of personnel arising from a layoff.

Had the intention been to incorporate layoff transfer policies into the recall Agreements, it seems likely that the parties would have referenced the one provision expressly dealing with transfers during layoffs.

Furthermore, although paragraph 4(b) of the Pratt & Whitney Agreement provides that "strikers will be treated

as if they had been laid off," the same language was deleted from the Hamilton Standard Agreements at the request of representatives from Lodge 743, and a provision stating that strikers would be recalled to "comparable" jobs inserted. The purpose of the change was to insure that it was clear that a striker had a right to return to his old job on a different shift, if it was available. 299 F.Supp. at 900. Presumably during recall from a general layoff there would be no such guarantee. That the Company readily agreed to this change in language²⁹ negates any purported significance of the "as if they had been laid off" language in the Pratt & Whitney Agreement.

Nor, finally, can the Strike Settlement Agreements be read as incorporating by reference all relevant provisions of the collective bargaining contracts negotiated concurrently with them. Had that been the desire of the contracting parties, they could have done so expressly. Instead they chose to cite only a specific portion of them. Under these circumstances it seems proper to apply the well-established rule that "a reference by the contracting parties to an extraneous writing for a particular purpose makes it part of their agreement only for the purpose specified." *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 240 U.S. 264, 277 (1916).

But it does not follow that because the Company's transfers and promotions cannot be justified on the ground that they were simply a continuation of a practice long followed during layoffs, they violated the Strike Settlement Agreements. Promotions and transfers are an integral part of any business operation, particularly a large manufacturing plant, and the Agreements were necessarily made against this backdrop. In fact, the Union admits

²⁹ See Joint Appendix 1155-57.

that nothing prohibited the Company from making transfers and promotions during the recall period. It is only promotions and transfers that prevented the recall of strikers which the Unions claim violated the Agreements.³⁰ The Agreements guaranteed that strikers would be recalled to "available" jobs and jobs "which develop." To that extent, the Union argues, the Agreements limited the Company's freedom of action.³¹

While we agree with the Union that the Agreements did act as a limitation upon the Company, we differ on the extent of that limitation. At trial, the Company claimed that transfers and promotions were necessary to contend with the imbalances caused by the strike. In other words, work might dry up in one particular area, but at the same time, openings would develop in another where registered strikers were perhaps awaiting recall.³² If the Agreements were construed as prohibiting promotions and transfers to fill those openings, the Company argued that it either would be faced with the necessity of laying off active employees while concurrently recalling strikers or would have more workers on its payroll than it could productively employ. The Union contends that the Agreements required the Company to recall the registered strikers under these circumstances and to make the layoffs if they were indeed necessary.³³ We consider that interpretation of the Agreements to be unreasonable. The Company was not required

30 Appellant's Brief at 107 n. 128.

31 We read language in paragraph 4(c) of the Agreements giving strikers the right to be recalled "before new employees are hired" as merely establishing an absolute priority over new hires in Phase 3. We do not think that it denotes unrestricted freedom to promote and transfer active employees so as to frustrate the right of strikers to be recalled to jobs "which develop."

32 Joint Appendix 627-29.

33 Appellant's Brief at 108-09.

to recall a striker where to do so would result in the layoff of an active employee.³⁴ There is no reason why the consequences of the production imbalance caused by the strike should have been visited upon the active employees who were themselves exercising a section 7 right by refraining from collective activity. 29 U.S.C. § 157. The Company's right to make promotions and transfers to deal with the problem of imbalance and keep its employees productively employed was embodied in the terms "available" jobs and jobs "which develop." As we have seen, these terms carried the implication that strikers would not be recalled until their services could be productively employed. They permitted, in our view, the Company's reshuffling of its productive resources so as to permit their most efficient utilization. No case insofar as we are aware, has required an employer to lay off its active employees so as to make room for strikers. And any such approach would be fundamentally inconsistent with an employer's right to hire permanent replacements for strikers and retain the replacements after the strike while the strikers remain out of work. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).³⁵ On the other hand, where a promotion or

34 The Union acknowledges that recall of a striker was not required in the cases where the active employee was senior to the registered striker. This is necessarily so, since the collective bargaining agreements, which made seniority the generally governing factor in layoffs, would not permit the layoff of a senior (in this case also "active") employee while a more junior employee (the registered striker) was recalled and retained in an active position.

35 It would not make sense to allow an employer to hire permanent replacements during a strike and, in effect, give those replacements post-strike employment preference over strikers, but then require that those replacements be laid off as a result of production adjustments made necessary by the same strike. Furthermore, contrary to the Union's suggestion, an interpretation of the Agreements upholding the Company's promotion and transfer policy is not contrary to *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). There the Supreme Court upheld the Board's determination that an employer's granting of twenty years

transfer was made ~~not to~~ correct a production imbalance and the effect of the promotion or transfer was to deny recall to a striker or cause a striker to be recalled to a lower labor grade than he otherwise would have, the action constituted a breach of the Agreements because it denied an available job to a registered striker.³⁶

Although we cannot on appeal determine the precise effect of this interpretation of the Agreements on the award of damages made by the district court, we can measure the effect in general terms. A more precise determination must be made on remand when the district court makes the findings hereinafter described.

We consider first the lateral transfer or demotion of junior active employees to positions within the same seniority area for which senior registered strikers were awaiting recall. The district court found that such transfers did not breach the Agreements, and the Union has appealed this ruling.

At Pratt & Whitney, recall under the Agreements was by seniority area and occupational group. Transfers made

super-seniority to striker replacements and strikers who returned to work during the strike was inherently discriminatory and destructive of employee rights and violative of the Act. The Court noted, *inter alia*, that super-seniority by offering exceptionally great job security to employees who returned to work undermined the strikers' mutual interest and dealt a crippling blow to the strike weapon. Furthermore super-seniority created a cleavage in the plant that would continue long after the strike was over. *Id.* at 230-31. In contrast, the promotions and transfers had no effect on the strike itself and caused no such lingering ill-effects within the plant except in the same sense that *Mackay* might engender embitterment by permitting some strikers not to be reinstated.

36 Mr. Vandervoort, personnel manager at Hamilton Standard during the recall period, testified at trial that he considered the matter of "optional" transfers ("in other words, if we had work for him where he was") to be sensitive matters. He also indicated that "probably" the only reason that active employees were transferred and promoted to jobs registered strikers were qualified to fill was to avoid layoffs. Joint Appendix 627-28.

for the purpose of correcting a production imbalance and avoiding a layoff of an active employee were permissible under the Agreements, as we have indicated. However, even transfers made for other purposes would not have had the effect of denying reinstatement to a registered striker, since they would have necessarily had the concomitant effect of opening up positions within the same occupational group and seniority area which the registered strikers could fill. Accordingly, we can perceive no basis for concluding that transfers at Pratt & Whitney could have injured a registered striker in contravention of the Agreement.

At Hamilton Standard the concept of "demonstrated ability" rather than "occupational group" was used to determine right of recall within a seniority area. Therefore, it is not inevitably true that a transfer within a seniority area, not made as a production adjustment to avoid a layoff, would open up a position for a registered striker. If at Hamilton Standard a junior active employee was transferred to a different position in preference to a senior registered striker who was awaiting recall to that position, and the striker had no "demonstrated ability" in the vacated position, the effect would have been to deny reinstatement to a registered striker. If such a transfer was not necessary to correct a production imbalance, it constituted a breach of the recall Agreement. As a practical matter, unless the Company was acting in bad faith with the specific purpose of denying reinstatement to registered strikers, something the district court found that the Company did not do, it seems unlikely that it would demote or laterally transfer employees where they could be used productively in their present positions. Consequently, in all probability, transfers at Hamilton Standard did not violate the Agreement as we have interpreted it.

Nevertheless, on remand the Union should have an opportunity to demonstrate that some transfers were made for purposes other than to correct production imbalance, and where such a transfer blocked the recall of a senior registered striker to recover appropriate damages.

With respect to the promotions of junior registered strikers, the district court found that 45 senior registered strikers (14 at Pratt & Whitney and 31 at Hamilton Standard), were entitled to damages, and the Company appealed this ruling. At Pratt & Whitney, essentially the same analysis applies as in the case of transfers. Promotions within the same seniority area and occupational group which were not made as a necessary production adjustment would, like transfers of the same sort, have opened up a position for a registered striker in the promotee's vacated position. Thus, such a promotion would not have denied reinstatement to a registered striker altogether. However, unlike the case of transfers, some registered strikers may, as a result of these promotions been recalled to lower paying positions than those to which they would have been entitled absent the unauthorized promotion. Accordingly, the district court should determine which, if any, of the 14 blocking transfers at Pratt & Whitney were prompted by a need to adjust production and avoid layoffs. Any such promotions did not breach the recall Agreement.

Likewise, at Hamilton Standard, the district court must determine which of the 31 promotions that denied reinstatement to registered strikers or caused them to be returned to lesser positions were caused by production needs and which were motivated by a desire to reward an employee for good performance or were for some other purpose not related to a necessary production adjustment.²⁷

²⁷ Recalling a striker to fill the vacancy would not necessarily have the effect of denying advancement to the man who would have been pro-

Only the latter type of promotion constituted a breach of the Agreement.

A similar analysis governs promotions to apprentices to jobs for which registered strikers were awaiting recall. As found by the district court, promotion to a bargaining unit job was the culmination of a three-year contractual period of training during which the apprentice became certified in a particular skill. 299 F.Supp. at 923. The Union has appealed the ruling that these promotions did not violate the Agreements. The Company was not obligated to lay off the apprentice after the completion of his period of training on account of the unsettled production conditions created by the strike. Nor was it obligated both to promote the apprentice and recall a striker to the same position, resulting in a surplus of employees. Accordingly, we affirm the finding that promotions of apprentices did not breach the Agreements.

Summarizing our holding with respect to the issue of promotions and transfers of junior active employees, we find that lateral transfers, demotions, and promotions made for the purpose of correcting production imbalances and avoiding layoffs where work in a particular area ceased to be available did not constitute breaches of the Strike Settlement Agreements. Personnel adjustments made for other reasons that had the effect of blocking reinstatement altogether or causing a striker's reinstatement to a lower position, on the other hand, did violate the Agreements. We have determined that no transfer or demotion made at Pratt & Whitney would have had the effect of depriving a registered striker of reinstatement, and therefore, the district court on remand need not consider transfers and

moted. After the striker had been restored to his job, the Company would have been in a position to make readjustments, within the terms of the collective bargaining contracts, to account for the fitness and ability of its workers.

promotions at Pratt & Whitney. At Hamilton Standard, however, we cannot say to a certainty that no blocking transfers were made for purposes other than to correct a production imbalance, and therefore it is open on remand for the Union to show that such transfers did occur and that they deprived a registered striker of reinstatement.

With regard to the 45 promotions found by the district court to have breached the Agreement, the district court should inquire into the reasons for these promotions. If they were made simply as a matter of personnel policy and not as a production adjustment, then the promotions were indeed breaches of the Agreements, as the district court found. If, on the other hand, the promotions were necessary production adjustments caused by post-strike production conditions, these promotions did not violate the Agreements.

The district court's determination with respect to apprentices is affirmed.

D. Preference for Non-striker Absentees

There were a significant number of non-strikers who nevertheless remained absent during the course of the strike (the absence having commenced either before or during the strike) because of illness, fear of violence, or other personal reason.³⁸ All of these individuals desiring continued employment with the Company were immediately reinstated at the conclusion of the strike. The district court found that this practice did not violate the Agreements, since during non-strike periods the Company would have regarded the reasons given as justifying an absence. 299 F.Supp. at 897. The district court also found no evidence that the Company had used this procedure as a means of discriminating against particular strikers.

³⁸ Although the Union contends that there were 170 of these individuals, the Company disputes this figure, and the district court made no finding on the point.

We agree with the conclusion of the district court. The Strike Settlement Agreements were silent on the issue of non-striker reinstatement, and an inference that non-strikers were by implication subject to its terms is unwarranted. The jobs of economic strikers were subject to being lost either because permanent replacements were hired or for other legitimate and substantial business justification. The Union and the striking employees were well aware of this risk. In contrast, there is no indication that those absent for valid personal reasons during non-strike periods risked losing their jobs.³⁹ It would have been manifestly unjust to expose them to the same risks as strikers merely because of the fortuity that the cause of their absence occurred during a strike. Indeed, we do not believe that strikers would reasonably have expected that these non-strikers would be treated in the same manner with respect to reinstatement.

The same can be said for those employees who were absent during the strike out of a bona fide fear of violence. These individuals did not voluntarily encounter a risk of loss of their jobs, and it would be unfair to treat them identically with those who did.

Interpreting the Agreements as not controlling the reinstatement of non-striker absentees is not, in our view, inconsistent with cases holding that an employer may not discriminate between strikers and non-strikers in declaring eligibility for certain benefits. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968). While strikers have a right to expect that engaging in protected collective activity will not subject them to discriminatory treatment with respect

³⁹ Of course, absence from work because of personal reasons unrelated to the strike or fear of violence is not protected activity, and had the Company chosen to terminate these individuals, nothing in the National Labor Relations Act would have prevented it from doing so. See *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), cert. denied, 404 U.S. 826 (1971).

to benefits, reinstatement must stand on a different ground for the reason that in leaving their positions vacant, strikers knowingly take the risk that their position will not be available at the strike's conclusion.

E. Prejudgment Interest

Although our analysis of the Strike Settlement Agreements requires reconsideration of the amount of damages, we take up the issue of prejudgment interest for the district court's future guidance.

Final judgment in this case was dated June 16, 1972. The district court awarded prejudgment interest on the recoverable damages from March 20, 1969, the date of the filing of its principal opinion containing its findings of fact and conclusions of law. The court chose that date because that was when the damages could be "ascertained as a liquidated sum." *Lodge 743, International Ass'n of Machinists v. United Aircraft Corp.*, 336 F.Supp. 811, 815 (D. Conn. 1971).

The Union contends that interest should have been awarded from the dates of the violations of the contract. They point to the policy of the National Labor Relations Board to award interest on its backpay awards⁴⁰ and argue that the same remedy should apply in Section 301 suits for violations of labor contracts. This conclusion, it is urged, follows from the decision in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957), holding that courts are to apply federal law in section 301 suits, looking to the policies behind our national labor laws in order to fashion appropriate rules. For the same reasons the Union argues that the district court should follow the NLRB prac-

40 *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The *Isis* rule was upheld in this Circuit in *Reserve Supply Corp. v. NLRB*, 317 F.2d 785, 789 (1963). It has also been upheld in at least seven other circuits. See *NLRB v. Local 138*, 385 F.2d 874, 878, n.22 (2d Cir. 1967), and sources cited therein.

tice of computing back pay on a quarterly basis, rather than make a single computation covering the entire period of unemployment.⁴¹

We of course agree that the decision whether to award prejudgment interest is governed by federal law, although it may be proper, as a matter of convenience, to look to state law in order to determine the appropriate rate.⁴² But from this premise does not flow the conclusion that remedies adopted by the NLRB are to be mechanically adopted by the courts in section 301 actions. Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts. *Blau v. Lehman*, 368 U.S. 403, 414 (1962); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 190-91 (2d Cir. 1975); *Occidental Life Ins. Co. of North Carolina v. Pat Ryan & Associates, Inc.*, 496 F.2d 1255, 1268-69 (4th Cir.), cert. denied, 419 U.S. 1023 (1974) (securities laws); *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), cert. denied, 414 U.S. 975 (1973) (securities laws); *Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir. 1971) (securities laws); *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-92 (2d Cir. 1969), cert. denied sub nom. *Muscat v. Norte & Co.*, 397 U.S. 989 (1970) (securities laws); *Ross v. Licht*, 263 F.Supp. 395, 411-12 (S.D.N.Y. 1967) (securities laws); *The Wright*, 109 F.2d 699 (2d Cir. 1940) (admiralty). There seems no sound reason why we should not take the same approach in suits

41 *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The adoption of this policy was upheld by the Supreme Court in *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 347-48 (1953).

42 Cf. 28 U.S.C. § 1961 (1970), which provides for post-judgment interest at the rate mandated by state law. Contrary to the argument of the Company, 28 U.S.C. § 1961 relates only to interest recoverable on the judgment itself and says nothing whatever about whether prejudgment interest is appropriate in a given case. *Louisiana & A. Ry. Co. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966).

under section 301 rather than rigidly adopt the identical remedies employed by the NLRB on actions involving unfair labor practices.⁴³ The Board's remedial rules are themselves not explicitly embodied in a statute; they are the product of the discretion that is vested in the Board to devise remedies to effectuate the policies of the Act. 29 U.S.C. §160(c); see *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). As such, they are subject to modification in order to conform to the circumstances of particular cases. *Id.* To be sure, it is proper in a section 301 case for a district court to look to the remedial policies of the Board for guidance. And this is so particularly where, as here, any damage award closely resembles the standard Board remedy of back pay. But the decision must remain that of the district court, and it is not compelled to follow the policies of the NLRB. In suits for breaches of labor agreements, as in other areas, a vital ingredient in the determination whether to award prejudgment interest is a desire to make whole the party injured by the breach, but in appropriate circumstances, compensatory principles "must be tempered by an assessment of the equities." *Norte & Co. v. Huffines*, supra, 416 F.2d at 1191; see *Board of Commissioners v. United States*, 308 U.S. 343, 352 (1943). ("[Interest] is denied when its exaction would be inequitable.") Although we are of course unable to anticipate the myriad factual situations which might arise, such factors as inordinate delay in prosecution of a suit or wrongdoing by the plaintiff could well

43 A variation of this approach has been taken in the one case of which we are aware that deals expressly with the question of prejudgment interest in suits under section 301. *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir.), cert. denied, 400 U.S. 877 (1970). The court refused to award prejudgment interest on a jury verdict for lost wages because the verdict would be too imprecise as to dates and amounts. However, the court indicated that award of prejudgment interest would be proper where the court could make such determinations.

give a district court pause before awarding prejudgment interest.

Whether to compute interest on a quarterly basis also should remain within the discretion of the district court. The NLRB adopted this method of computation chiefly to cure the conflict with the Board's reinstatement remedy that occurred whenever a wrongfully discharged employee later obtained a higher-paying position with a new employer. The employee was faced with a Hobson's choice of either waiving his right to reinstatement, thereby terminating the period for running of back pay, or retaining a future hope of reinstatement while seeing his back pay award steadily diminish. See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Although similar circumstances would normally not be present in a section 301 action for damages, there may be times when the remedy will be appropriate, such as when an employer intentionally uses dilatory tactics in defending a suit solely to reduce the potential damage award.

Because the district court here did not approach the issue of prejudgment interest as a matter within its sound discretion, we are constrained to remand the question for reconsideration in light of this opinion. The district court applied the rule that prejudgment interest is not recoverable on an unliquidated sum that is incapable of ascertainment. See, e.g., *Williston on Contracts* §1413 (3d ed. 1968). Since the extent of the Company's liability for breach of contract, if any, was not known until the filing of the opinion on March 20, 1969, the court ruled that interest was collectible commencing on this date. But the rule applied by the district court is certainly not a rigid one, precluding altogether the award of such interest. *In re Paramount Publix Corp.*, 85 F.2d 42, 45 (2d Cir. 1936). Rather, the fact that the sum on which interest was to be

awarded remained unliquidated until March 1969 was itself reason for the district court to exercise its discretion. See *Norte & Co. v. Huffines*, *supra*, 416 F.2d at 1191; Restatement of Contracts §337(b).

The district court seems also to have based its decision not to grant prejudgment interest from the dates of breach on the Company's good faith and innocence from "unlawful, wrongful, and vexatious conduct." 336 F.Supp. at 813-14, citing *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49, 53, 54 (7th Cir. 1955). However, awards of prejudgment interest are essentially compensatory, *Norte & Co. v. Huffines*, *supra*, 416 F.2d at 1189-91, and wrongdoing by a defendant is not a prerequisite to an award.

The district court may wish to take into account the foregoing considerations, and therefore we remand the question of allowable interest for such consideration as the district court may deem appropriate.

F. Costs

In its final judgment, the district court awarded costs to the plaintiff Union. The Company contends that this action was an abuse of discretion in view of the fact that the plaintiffs were successful in proving breach of contract only with respect to 72 strikers out of a total of 3,503. We disagree.

Rule 54(d) of the Federal Rules of Civil Procedure provides in part that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs" It is axiomatic that a plaintiff need not sustain his entire claim to be regarded as the prevailing party. See 6 MOORE'S FEDERAL PRACTICE ¶54.70[4] (2d ed. 1974). Here, although the Company characterizes the violations found by the district court as "minor" or "technical," the plaintiffs were awarded a judgment in

excess of \$310,000, a substantial sum by any standard. The district court may well have been within the bounds of its discretion if it had apportioned costs between the parties, but it chose not to do so and we cannot say that this decision was improper.

In accordance with the foregoing discussion, the judgment of the district court is affirmed except as to its conclusions regarding the transfer and promotion of junior active employees and the determination to award prejudgment interest only from March 20, 1969. The case is remanded to the district court to make the findings outlined in Part I.C. of this opinion and to allow the district court the opportunity to reconsider its position on prejudgment interest in light of Part I.E. of this opinion.

The Company will be awarded three-fourths of its costs incurred in connection with this appeal.

II. The Decision and Order of the National Labor Relations Board.

A. General Introduction

A hearing before a Trial Examiner was conducted intermittently for a period of five years from 1963 to 1968. Although the NLRB proceedings were somewhat broader in scope than those before the district court, in substantial part the NLRB proceedings also involved the Company's administration of the Strike Settlement Agreements. The factual allegations were essentially the same, and only the legal conclusions sought to be drawn were different: before the Board the Union (and the General Counsel) urged that the Company's conduct amounted to unfair labor practices rather than breaches of contract.

The hearing finally terminated in June 1968. By this time, the trial in the section 301 suit had been concluded, although the district court had not yet rendered a decision. The record in the 301 suit had also been placed in

the judicial notice file after the Trial Examiner had sustained the Company's objection to a Union and General Counsel motion to admit the entire record into evidence.

The Trial Examiner issued his 138-page decision on July 25, 1969, approximately four months after the district court had handed down its ruling finding that the Company had not breached the Strike Settlement Agreement except in certain limited respects. As to the period from the end of the strike to December 31, 1960, the expiration date of the recall Agreements, the Trial Examiner also ruled generally in favor of the Company. However, the Trial Examiner held that the Company had violated section 8(a)(3) of the Act by cutting off (as provided in the Agreements) the preferential hiring rights of strikers on December 31, 1960. He ruled that strikers not recalled by that date were entitled to preferential hiring treatment through April 1961, when full complements had been restored at all plants.

On review of the Trial Examiner's decision, the NLRB adopted his findings and conclusions with some modification, the most important being the Board's conclusion that in the course of negotiating the Strike Settlement Agreements, the Union had bargained away the reinstatement rights of those strikers who had not been rehired by the expiration date of the Agreements. Thus, the Board reversed the finding that the Company had violated Section 8(a)(3) by not continuing preferential hiring of strikers past December 31, 1960.

The other pertinent findings of the Trial Examiner and the Board will be summarized in due course.

B. Right to Reinstatement Following the Termination of the Strike Settlement Agreements.

Any discussion of the reinstatement rights of economic strikers must begin with *NLRB v. Mackay Radio & Tele-*

graph Co., 304 U.S. 333, 345-46 (1938). There the Supreme Court upheld the right of an employer to hire permanent replacements for strikers and to retain the replacements at the conclusion of the strike even at the expense of not reinstating the strikers.

At the outset, it is appropriate to deal with the Union's contention that none of the strikers involved in this case had been permanently replaced. This argument is premised on the fact that the Company did not designate by name the man or woman whom a new hire replaced. We find the contention to be without merit.

An employer may not of course avoid reinstating strikers by the use of "pretextuous 'permanent replacements'", *International Association of Machinists, District No. 8 v. J. L. Clark*, 471 F.2d 694, 698 (7th Cir. 1972). The employer must establish that new hires in fact occupied positions formerly filled by strikers. But it does not follow that the employer must identify the replaced striker by name, although such a practice might be desirable as one means of helping to avoid post-strike disputes. Merely naming the striker supposedly replaced would not necessarily be dispositive of the issue of permanent replacement anyway, since the striker could always contend that the naming of an individual was a pretext to avoid reinstating him and that his job was not in fact occupied by the new hire. Here new hires at the end of the strike were assigned to jobs according to job code, department, and shift, just as the strikers had been. Neither the fact that particular strikers replaced were not identified by name nor the difficulty of identifying those employees whose jobs were occupied by new hires means that none had been permanently replaced. This was not a scheme to discriminate among strikers; the order of recall was fixed by agreement. As a practical matter, it made no

difference whether a striker's job was filled by a replacement or was unavailable for other reasons. Some of those strikers who remained unreinstated on December 31, 1960, had undoubtedly had their jobs filled by replacements before the end of the strike; others were not recalled because reduced post-strike complements caused their jobs to be unavailable until after the expiration of the Agreements. In either event, the strikers would be recalled in accordance with the terms of the Agreements.

The status in the courts of such agreements has been well and succinctly summarized in the Supreme Court's opinion in *Retail Clerks v. Lion Dry Goods Inc.*, 369 U.S. 17, 28 (1962), Mr. Justice Brennan stating for the Court:

"Contract in labor law is a term the implications of which must be determined from the connection in which it appears." *J. I. Case Co. v. Labor Board*, 321 U.S. 332, 334. It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within §301(a). "[F]ederal courts should enforce these agreements on behalf of or against labor organizations and . . . industrial peace can be best obtained only in that way." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455.

Many decisions subsequent to *Mackay, supra*, have elaborated on the rights and duties of employers with respect to the reinstatement rights of economic strikers. There should be little reason to look beyond the terms of the Agreements for a definition of the rights of the parties after December 31, 1960, but for two decisions handed down seven and eight years later.

In *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), the Supreme Court, reversing a 2-1 decision of the Ninth Circuit, held that economic strikers whose jobs were temporarily unavailable at the time they applied for reinstatement were entitled to an offer of re-employment "[i]f and when a job for which the striker is qualified becomes available . . ." *Id.* at 381. The court relied particularly on the fact that under the Act a striker remains an employee until he has obtained "other regular and substantially equivalent employment," 29 U.S.C. §152(3) (1970), and therefore reasoned that the right to reinstatement was not dependent on job availability at the time of application.

After the decision in *Fleetwood*, the NLRB extended the rationale of that case in favor of strikers who had been permanently replaced but whose jobs subsequently became vacant because of the departure of the replacements. The Board held that such strikers were entitled to reinstatement unless they had acquired substantially equivalent employment elsewhere. *The Laidlaw Corporation*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *Laidlaw* represented a departure from the Board's previously well-settled rule that an employer who had permanently replaced an economic striker was thereafter under no obligation to treat the striker as anyone other than a new applicant for employment. *E.g., Brown & Root, Inc.*, 132 NLRB 486 (1961), *enforced*, 311 F.2d 447 (8th Cir. 1963). This Circuit is

among those which have unanimously ruled that *Laidlaw* was a permissible extension of the Supreme Court's decision in *Fleetwood, H. & F. Binch Co., Plant of Native Laces and Textile Division of Indian Head, Inc. v. NLRB*, 456 F.2d 357 (2d Cir. 1972).

The Trial Examiner found that *Laidlaw* mandated continuation of the preferential hiring list past December 31, 1960. The Board reversed on the ground that such rights had been bargained away by the Union.⁴⁴ The Board saw

44 The Board stated:

In considering whether to modify Respondent's obligation as defined in the recall agreement in view of *Laidlaw*, we have considered the following factors. The recall agreement was one of three agreements negotiated by the parties in order to settle the issues arising from the strike. The strike was an economic strike. On behalf of the employees and the Unions, the agreements were negotiated by top officials of the Charging Parties who were experienced, competent, and knowledgeable. In order to reach agreement on disputed issues, Respondent made concessions which it might not have been willing to make if it knew that the Charging Parties would repudiate part of the recall agreement. The Charging Parties have accepted the benefits of the agreements; in fact, they have sued Respondent for breach of the recall agreement. The recall agreement was entered into by Respondent in good faith. It has also been performed in good faith by Respondent. The recall agreement did not represent an attempt by Respondent to undermine the Union. By contemporaneously signing a new collective-bargaining contract with the Unions, Respondent guaranteed the continued representative status of the Unions for the life of the new contract without regard to the number of strikers who might not be reinstated. Moreover, *Laidlaw* was not decided until 1968. At the time the recall agreement was signed in 1960, the prevalent rule could reasonably have been regarded as having been that an economic striker's right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list. Thus in agreeing to give striker's for whom jobs were not immediately available preferred hiring status for approximately 4½ months after termination of the strike, Respondent gave them reinstatement rights which exceeded the requirements of the law as it was then understood.

If, as the Supreme Court has held, an employer can unilaterally terminate the reinstatement rights of economic strikers for legiti-

the Strike Settlement Agreements, a product of lawful collective bargaining, as embodying the reinstatement rights of the strikers. Although it reserved the right to override such a private agreement that waived statutory rights,⁴⁵ the Board saw acceptance of an agreement in certain circumstances as promoting the process of collective bargaining and deserving of protection:

So long, therefore, as the period fixed by agreement for the reinstatement of economic strikers is not unreasonably short, is not intended to be discriminatory, or misused by either party with the object of accomplishing a discriminatory objective, was not insisted upon by the employer in order to undermine the status of the bargaining representative, and was the result of good-faith collective bargaining, the Board ought to accept the agreement of the parties as effectuating the policies of the Act which . . . includes as a principal objective encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes.

mate and substantial business reasons, it would seem that such rights should also be terminable by agreement between the employer and the bargaining representative of the strikers.

192 NLRB at 387-88 (footnotes omitted).

Members Fanning and Brown dissented on this issue. They interpreted the Strike Settlement Agreements as providing that all strikers would continue to be recalled on a preferential basis until the complements were restored to pre-strike levels.

- 45 The Board in fact did so on the same day as the decision in the instant case. *Laher Spring & Electric Car Corp.*, 192 NLRB 464 (1971). Finding that there was discriminatory intent on the part of the employer, the Board stated:

Where such discriminatory manipulation has been shown . . . we are unwilling to accord the literal terms of the agreement final and determinative weight. The policies of the Act would hardly be effectuated by our deferring to an agreement, the terms of which have been used by Respondent in a manner as to cloak discrimination against strikers.

192 NLRB at 466.

192 NLRB at 388. In support of the conclusion that the Union could waive the reinstatement rights of its members, the Board cited cases upholding waiver of the right to strike. *Id.* at 386; see *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

The question of whether a Union can waive the reinstatement rights of economic strikers was reserved by the Supreme Court in *Fleetwood*. 389 U.S. at 381 n.8. Before this court, the Board contends that striker reinstatement is an appropriate area for bargaining—one in which both union and employer can secure concessions to their mutual advantage. The Union, on the other hand, argues strenuously that the statutory reinstatement rights represent a limit set by Congress on the risks to be borne by individual strikers. As such, they are not subject to waiver by a collective bargaining representative.

However, the issue of waiver by a union need not be decided in this case. In our view it is inaccurate to speak of statutory reinstatement rights having been waived here. The Supreme Court did not decide *Fleetwood* until 1967; the Board's decision in *Laidlaw* was not issued until 1968. We are at a loss to explain how the Union could make a knowing and voluntary⁴⁶ waiver of the rights created by those cases when it had no way of knowing what those rights were. As matters stood in 1960, it was clear that strikers whose positions had been filled by permanent replacements or whose jobs had been abolished on the date they applied for reinstatement were not entitled to preferential employment treatment at that or any future time.

⁴⁶ We take this to be the appropriate standard for a waiver of statutory rights in this context. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); *American Bridge Division of United States Steel Corp.*, 206 NLRB 265 (1972). Cf. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Bartlett-Collins Company, 110 NLRB 395 (1954), enforced, *American Flint Glass Workers Union v. NLRB*, 230 F.2d 212 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956). See also *Brown & Root, Inc.*, *supra*. The employer's duty was simply not to discriminate against former strikers in hiring new employees.

The law was less clear with respect to employees whose jobs were only temporarily unavailable at the time of their application for reinstatement, the situation considered by the Supreme Court in *Fleetwood*. To our knowledge, there was in 1960 no Board or court decision dealing with precisely those circumstances. The closest decision that we have discovered is *Atlas Storage Division*, 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Teamsters & Helpers "General" Local No. 200 v. NLRB*, 233 F.2d 233 (7th Cir. 1956). There the company had lost business during a strike, and the work of an economic striker had been absorbed by the other employees. As a consequence, the employer denied reinstatement. Three days thereafter, however, a position opened up when an employee was injured. The Board ruled that the employer was under no duty to offer the then vacant position to the former striker because his employment had been properly terminated when he had applied for reinstatement and it had been refused. 112 NLRB at 1180 n.15. *Atlas Storage Division* can be read as applying only when an economic striker's job has been permanently eliminated by an employer. But there is a basis for concluding that the same rule should apply to temporary job unavailability, for in either case a striker could reasonably be expected to have an opportunity to regain a position with his employer. In any fairly sizable operation, employee turnover would assure that a job would eventually become available to economic strikers not immediately reinstated at the termination of a strike. This is true not

only when a strike has caused a temporary cutback in business but also when a striker had been permanently replaced, or his job absorbed by other workers. As a consequence, as long as an employer did not fabricate temporary job unavailability as a means of discriminating against strikers, *Atlas Storage Division* gave reasonable grounds for concluding that in all instances the reinstatement right of an economic striker was to be determined when he applied for reinstatement. A panel of the Ninth Circuit (one judge dissenting) evidently thought this to be so in *Fleetwood*,⁴⁷ although the Supreme Court ultimately disagreed. Moreover, it was the Supreme Court's decision in *Fleetwood* that induced the Board in *Laidlaw* to revise its long-standing position with regard to the reinstatement rights of permanently replaced strikers. If the Supreme Court in *Fleetwood* had not changed the law as it applied to reinstatement of economic strikers but instead simply reaffirmed long-established principles, we doubt that the case would have so immediately prompted the Board to change course and overrule three of its prior decisions (*Brown & Root Inc.*, *supra*; *Bartlett Collins Company*, *supra*; and *Atlas Storage Division*, *supra*).

For the reason that *Fleetwood*, like *Laidlaw*, in our opinion, established rights not existing in 1960, there could have been no knowing waiver of *Fleetwood* rights in this case. In addition, there is no question that the Union was under the impression that the principal reason that strikers would not be reinstated immediately was that they had been permanently replaced. Although the Strike Settlement Agreements left room for the operation of economic factors, the prospect of the complement remaining below pre-strike levels for the duration of the Agreement was

⁴⁷ *NLRB v. Fleetwood Trailer Co., Inc.*, 366 F.2d 126 (9th Cir.), *rev'd*, 389 U.S. 375 (1967).

never seriously discussed in negotiations. Thus, the issue of temporary job unavailability beyond the expiration of the Agreements was not a consideration. Under such circumstances, the Union could not have knowingly waived the statutory rights of its members.

Having determined that the Union could not have knowingly waived its members' later-acquired *Laidlaw* and *Fleetwood* rights, the fundamental question becomes whether *Fleetwood* and *Laidlaw* should be applied retroactively to 1960.⁴⁸ Whether retroactively to apply newly adopted administrative rules is determined by balancing a variety of factors well summarized by Judge McGowan in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972): "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite reliance of a party on the old standard." Taking these considerations into account, we find that retroactive application of *Laidlaw* and *Fleetwood* in this case would be unwarranted.

As previously noted, *Laidlaw* expressly overturned a well-established rule existing in 1960 that the reinstatement rights of permanently replaced strikers were determined at the time of application for re-employment. *Fleetwood*

⁴⁸ Whether to give retroactive effect to administrative rules promulgated in agency adjudication is a question of law, and reviewing courts are not obligated to grant any deference to the agency decision. *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), citing *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

was not so abrupt a departure from precedent as *Laidlaw* in that the Board had not spoken to the precise issue presented in *Fleetwood*. But a reasonable reading of decisions existing in 1960, particularly *Atlas Storage Division, supra*, would be that the same rule applied to strikers whose jobs were temporarily unavailable at the close of the strike. Why, if an employer was not required to seek out employees whose jobs had been abolished or absorbed even though, as expressly recognized in *Atlas Storage Division*, vacancies would likely occur soon thereafter, should an employer be required to seek out those whose jobs would be unavailable for an indefinite period of time? Thus, even though *Fleetwood* did not expressly invalidate prior Board decisions, neither can it be concluded that the issue had been entirely an open one up until the time of that case. However obvious the correctness of the result in *Fleetwood* may seem to us now, we view the situation with which it dealt from a perspective fifteen years removed from the events occurring in this case.

At the termination of the strike, one could have concluded that those strikers whose jobs were not available when the strike terminated, whether because they had been permanently replaced or because of production dislocations caused by the strike, had no further statutory right to reinstatement, other than not to be discriminated against in favor of other new applicants for employment. Even treating the terms of the Strike Settlement Agreements as a collective application for reinstatement for the duration of the Agreements, when, on December 31, 1960, jobs were not available to certain strikers, the statutory reinstatement rights of those individuals were extinguished.

Because *Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed, it would be un-

just to use those cases to impose liability fifteen years after the events at issue transpired.⁴⁹

This is not a case in which the employer sought in bad faith to discriminate against strikers. Both the Board⁵⁰ and the district court in the 301 case found otherwise. Throughout the strike settlement process, the Company had the advice of experienced labor counsel. The Strike Settlement Agreements providing for the preferential recall of strikers to jobs in their seniority areas which they were qualified to perform exceeded requirements of existing law. Under these circumstances we are not at this stage disposed to permit imposition of a substantial liability upon the Company.

One final point remains to be made with respect to the post-Strike Settlement Agreement period. The Union contends that the Board failed to make a finding on the contention that those strikers not rehired by December 31, 1960, were subsequently discriminated against when they reapplied for employment. That any such discrimination would be unlawful is clear. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). However, the Trial Examiner

⁴⁹ We are of course mindful that in *H & F Binch Co. Plant of Native Laces v. NLRB*, 456 F.2d 357 (2d Cir. 1972), this court did uphold a Board order applying *Laidlaw* retroactively. However, the failure to reinstate in *Binch* had occurred after the Supreme Court's decision in *Fleetwood* and this court noted:

"The Supreme Court's decision in *Fleetwood* should have demonstrated the erosion of employees' freedom in treating jobless economic strikers as new applicants"; the extension in *Laidlaw* thus was hardly a great surprise.

456 F.2d at 365, quoting *American Machinery Corp. v. NLRB*, 424 F.2d 1321, 1328 (5th Cir. 1970). In contrast to *Binch*, the D. C. Circuit refused to apply *Laidlaw* to events occurring prior to *Fleetwood*. *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972).

⁵⁰ See discussion at note 55 *infra*.

made an express finding on this very point. Immediately after deciding that *Laidlaw* gave strikers not reinstated pursuant to the Agreements the right to remain in a preferred hiring status, and in the same paragraph, the Trial Examiner stated:

[T]he evidence offered by the general counsel and charging parties is insufficient to find a pattern of discrimination against all employees named and listed in the complaint.

192 NLRB at 437. This must be read as referring to those strikers still unreinstated as of December 31. Moreover, it is a finding supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In January 1961 the Company sent letters to former strikers inviting them to apply for employment as new employees. Although the Company ultimately did not accept all these applications, from January 1 to April 30, 1961, at Pratt & Whitney the Company hired approximately 468 of those strikers reapplying for work. This figure contrasts with an approximate figure of less than 10% of non-striker applicants who were ultimately hired during the same period. At Hamilton Standard approximately 30% of strikers reapplying were hired.⁵¹

C. The Period of the Strike Settlement Agreements

By the time the Trial Examiner issued his decision, he had the benefit of the district court's findings and conclusions in the section 301 case. The Examiner referred to that decision and noted that the General Counsel and the Union had relied on the same evidence to prove unfair

⁵¹ The Union and the General Counsel did not submit evidence of discrimination against individual strikers, relying instead on a pattern of discrimination.

labor practices as had been presented in the district court to support breach of contract claims. The Trial Examiner continued:

In an overall consideration of the contracts and a masterly analysis of all the facts and circumstances of the situation [the district court] found that the [Company] carried out the Strike Settlement Agreements in good faith except in the two categories of transfers and promotions.

192 NLRB at 438.

It will be recalled that the district court found contractual violations in four separate types of transfers and promotions.⁵² But immediately after making the statement quoted above, the Trial Examiner discussed only one of these areas: the "waiver" policy in which strikers recalled to other than their old jobs signed waivers of reinstatement in order to wait for a vacancy in their former job code; thereafter, when such a vacancy did occur, the Company transferred or promoted a striker into the vacancy in preference to the striker who had signed the waiver. The Trial Examiner found that such action also constituted a violation of section 8(a)(3) of the Act and thereafter stated: "Except as set forth above . . . I find no merit in the contention that respondent otherwise discriminated against employees to discourage membership in a labor organization within the meaning of Section 8(a)(3) of the Act." *Id.* at 439.

⁵² The areas were: promotion of active employees within an occupational group and seniority area to jobs within the same group and area where senior registered strikers were awaiting recall; transfers of employees across occupational groups and seniority areas to jobs for which senior registered strikers were awaiting recall; transfer of certain trainees into jobs for which registered strikers were awaiting recall; and the Company's waiver policy discussed in the text. Not all these findings were appealed. See note 25 *supra*.

In adopting the Trial Examiner's decision, the Board concluded that he had found violations of section 8(a)(3)⁵³ in all instances that the district court had found violations of the Strike Settlement Agreements. The Board also found that the Trial Examiner had adopted the findings of the district judge. Were we interpreting the Trial Examiner's admittedly ambiguous decision on a clean slate, we would conclude that the Trial Examiner found unfair labor practices in only one area, namely, the Company's waiver policy. Moreover, his findings seem to us to have been based on the evidence presented before him and not the record in the section 301 case, which had been placed in the judicial notice file.⁵⁴ But, being mindful of the Board's prerogative to modify the decision of the Trial Examiner, we do not care to take issue with the Board's interpretation.

The Board made an independent examination of the record in the 301 case and adopted the district court's basic finding that the Company acted in good faith throughout the period of the Agreements. Additionally, the Board concluded that production imbalance and parts shortages were the cause of the reduced complements and the concomitant failure to reinstate all strikers and were a sub-

53 Section 8(a)(3), 29 U.S.C. §158(a)(3) (1970) provides in part:

(a) It shall be an unfair labor practice for an employer—

...

(3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization

54 It seems strange that the Trial Examiner would have adopted the findings of the district court after he had refused to admit the record into evidence (he instead placed it in the judicial notice file) and had expressly stated that the record would not be used as substantive evidence. Joint Appendix 1197.

stantial justification therefor.⁵⁵ The task of balancing employer justification against the infringement of employee right is the primary responsibility of the Board and not the courts. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *NLRB v. Great Dane Trailers Inc.*, 388 U.S. 26, 34 (1967). Having upheld the district court's principal factual findings, we also conclude that the Board's factual determinations are supported by substantial evidence. Nor are we disposed to disturb the Board's basic conclusion that the failure to restore full complements thereby reinstating all strikers, was itself not an unfair labor practice.⁵⁶

55 The Board erred in stating that the 301 record had by agreement of the parties been placed in evidence before the Trial Examiner. The General Counsel and the Union sought to introduce it, but the Company strenuously objected, and as a result, the record was placed in the judicial notice file. However, the Company can now scarcely object to the use of the record by the Board to support the principal findings that the Company was motivated by legitimate and substantial business considerations in failing to restore the complements to pre-strike size. Both the district court and the Board resolved this issue in favor of the Company. Insofar as the Board used the record to find that the Company committed unfair labor practices where it violated the Agreement, the Company will be able to voice its objections to the use of any particular portions of the record because, as discussed *infra*, we must remand for reconsideration in those areas where the Board found that certain promotions and transfers constituted unfair labor practices.

56 We do not think that the allocation of the burden of proof used by the district court and the Board is inconsistent with *Fleetwood's* direction that the burden of proving business justification for failure to reinstate strikers is on the employer. 389 U.S. at 379 n.4. The Board found that the Company had borne the burden of going forward and rebutted the *prima facie* case of discrimination; the Union and General Counsel then failed to overcome that answer. Thus, the preponderance of the evidence remained on the side of the Company. The Supreme Court's concern in *Fleetwood* was that an employee not have the burden of himself showing the lack of business justification when all the proof relating to justification was in possession of the Company. It is incumbent on the Company to come forward with what evidence of justification that it might have. *Fleetwood* did not, as we read it, decide what party ultimately bore the risk of nonpersuasion in the event that after all the evidence is in the scale remains evenly balanced. The employer in *Fleetwood* had presented no evidence in

While adoption of the findings of the district court is unquestionably a novel approach to adjudication, because the Board made an independent examination and appraisal of the evidence, the procedure need not be condemned.

We have considerable difficulty, however, with the Board's conclusions with respect to promotions and transfers. It is unclear to us how the Board arrived at its conclusion. In addition to the ambiguous statements of the Trial Examiner, the Board's entire consideration of this matter consists of three sentences:

Based on the uncontradicted evidence before him, the Trial Examiner also concurred in the ruling of [the district court] in respect to the settlement agreement violations by the [Company] regarding transfers and promotions of junior employees, and found this conduct also constituted violations of section 8(a)(3). He suggested either accepting the court's identification of those discriminatees or holding a later hearing for that purpose. In agreeing with the Trial Examiner's finding of violations of Section 8(a)(3), we also find that it would avoid duplication of remedies if we adopted the identification of those discriminatees by the court.

192 NLRB at 385. A possible interpretation of this language is that *because* certain transfers and promotions violated the Agreements they also violated the Act; conversely, *because* there was no violation of the Agreements there was no violation of the Act. The latter is essentially the contention urged by Board counsel in this proceeding.⁵⁷

justification. Furthermore the Board's findings reveal that this was not a case in which the placement of the ultimate burden of persuasion was decisive of the outcome.

⁵⁷ NLRB Brief at 35; Reply Brief at 12.

It would be consistent with the Board's theory that the Union waived any statutory reinstatement rights existing after December 31, 1960: that is to say, the recall Agreements were in all respects dispositive of the reinstatement rights of the strikers. However, Board counsel's explanation notwithstanding, it is not at all clear that this was the Board's reasoning. The Trial Examiner apparently purported to make an independent assessment of whether the Act was violated by transfers and promotions. From the language quoted above, it appears that the Board did also. But if this be so, we are at a loss to explain how the Board reached its conclusion that some transfers and promotions were unfair labor practices and others were not. For example, why are transfers *across* seniority area lines which denied reinstatement to a striker (an 8(a)(3) violation according to the Board) any more likely to encourage or discourage membership in a labor organization than transfers *within* the same seniority area (not a violation of 8(a)(3)) which had the same effect? The same can be said for promotions and transfers of trainees (a violation) and apprentices (not a violation). There may be a reasonable basis for these conclusions, but without some further explanation by the Board, we cannot understand what it was. In short, if the Board made an independent assessment of the Company's administration of the recall Agreements, there has been a total failure to articulate the bases for its conclusions. The powers of the courts of appeals unfortunately do not include the ability to delve into the Board's collective mind and discern the ground for decision. For us to review a decision of the Board, it must disclose its reasoning. See *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-44 (1965). The failure of the Board to do so requires denial of enforcement with respect to the 8(a)(3) findings and a remand for further

consideration of those promotions and transfer policies asserted by the Union in its petition for review to have been unfair labor practices and not found by the Board to be such.

If, on the other hand, contrary to our reading of the Board opinion but in accordance with the interpretation advanced by Board counsel, the findings of unfair labor practices (or absence thereof) were pinned directly to the presence or absence of a Strike Settlement Agreement violation, remand would be required for the Board at least to be given an opportunity to reconsider in light of the altered construction of the contract as in Part I of this opinion. It will be recalled that we determined that promotions and transfers of junior active employees violated the Agreements only when such transfer or promotion was not necessary to correct a production imbalance and avoid the layoff of an active employee. In our view, the Board, having exercised jurisdiction over the matter,⁵⁸ could have made an independent legal assessment of whether the conduct was violative of the Act. It was not sufficient for unfair labor practice purposes to say that certain conduct did not violate the Agreements, for the Board is by statute expressly empowered to override private arrangements.⁵⁹ 29 U.S.C. §160(a) (1970); see *Lodge 743 v. United Air-*

58 We leave aside the question whether the Board might have, as a matter of discretion, declined to exercise its jurisdiction over conduct during the period of the Agreements alleged to have been unfair labor practices. See *Smith v. Evening News Association*, 371 U.S. 195, 198 n.6 (1962). Cf. *Nabisco, Inc. v. NLRB*, 479 F.2d 770 (2d Cir. 1973) (approving the Board's deferral to the arbitration process.)

59 Even if it is assumed that in 1960 the Company had no legal obligation to reinstate some of the strikers, such as those who had been permanently replaced, having undertaken to offer reinstatement, the Company could not discriminate against strikers in an unlawful manner. To take an extreme hypothetical example, an employer plainly could not refuse reinstatement to the leaders of a lawful strike while offering reinstatement to those strikers who had been less active in their support.

craft Corp., 337 F.2d 5, 8-9 (1964) *cert. denied*, 380 U.S. 908 (1965). The Board found that the Agreements were the product of good-faith collective bargaining and not entered into with a discriminatory purpose. The written Strike Settlement Agreements here were simple documents; they did not on their face unambiguously resolve the myriad different interpretational questions that later arose during the actual recall process. The details of the administration of the Agreements, we suspect, were not considered by the parties until well after execution of the Agreements.

Although in some instances contractual violations may violate the Act as well, such as an outright refusal to reinstate any strikers after a promise to do so, coupled with the hiring of new employees, see *NLRB v. Roure-Dupont Mfg., Inc.*, 199 F.2d 631 (2d Cir. 1952), in this case, there has been no such disregard of contractual terms and discrimination against strikers. Under these circumstances a violation of section 8(a)(3) would not necessarily follow from a violation of the Agreements.

All of this is not to say that the Strike Settlement Agreements, as we have interpreted them here, cannot serve as a referent for the Board. Courts are after all obliged by *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), to endeavor to construe labor agreements so as to effectuate national labor policy. And the Board's unfair labor practice findings may well coincide with the breaches of the Agreement we have found. But the existence of these Agreements does not relieve the Board of its duty to determine whether the contract itself was unlawfully discriminatory within the meaning of the Act.⁶⁰

60 Our reasoning with respect to promotions and transfers applies equally to the Union contention preserved on review that the reinstatement of all nonstrikers absent during all or part of the strike violated the Act. The district court found that this did not violate the Strike

Accordingly, we remand to the Board for further consideration of whether the actions of the Company taken in carrying out the Strike Settlement Agreements might have constituted unfair labor practices.⁶¹

Settlement Agreements, and we affirmed on this point. See Part ID *supra*. The Board did not find this to be an unfair labor practice but gave no reasons for this conclusion. On remand the Board should state the reasons for whatever conclusion it reaches.

- 61 The Company has devoted the bulk of its 134-page brief in opposition to the Board's petition for enforcement to the contentions that the strike was unprotected (thereby negating the strikers' right to reinstatement) because it was caused and prolonged by the Union's unfair labor practices (in the form of bad-faith bargaining and strike-related violence), and that the entire Board proceeding was a violation of due process.

A sufficient answer to the first argument is that, except as to 50 strikers charged with serious misconduct whose cases were referred to arbitration, the Company never pleaded that its failure to reinstate strikers was in fact based upon the allegedly unprotected nature of the strike. Under those circumstances the allegations of bad-faith bargaining and general strike misconduct could not serve as a blanket defense to the section 8(a)(3) charges. See *Cone Bros. Contracting Co.*, 158 NLRB 186, 214 (1966) (misconduct of a striker constitutes a defense to failure to reinstate only if employer's refusal was in fact motivated by the misconduct). Cf. *Confectionery & Tobacco Drivers Union v. NLRB*, 312 F.2d 108, 112-13 (2d Cir. 1963).

As to the due process point, it is unquestionably true that the proceedings in this case were extremely lengthy. But by the same token the sheer numbers involved—approximately 6,500 registered strikers in plants employing some 20,000 people—were extraordinarily large and problems of proof of necessity correspondingly complex. Although the hearing with interruptions took five years, the proceedings in the district court, which were not as broadly based, took nearly eight years from the issuance of the complaint until a decision on the merits. Nor do we consider the vast majority of the charges to have been wholly frivolous, as the Company urges. Although the bulk of the charges was ultimately determined adversely to the Union, there was clearly room for reasonable men to have differences of opinion with respect to most of them. Likewise, the argument that the proceedings were intended merely to perpetuate the Union as the collective bargaining representative for employees at the plants loses force when it is considered that the Company voluntarily recognized the Union throughout most of the proceedings. The contention that the Board should have stayed its proceedings pending the outcome of the 301 case is also weakened by the failure of the Company to request it to do so. Further-

D. Duty to Bargain in Good Faith

The Union raises two issues having to do with the duty to bargain in good faith imposed on the company by section 8(a)(5) of the Act. The first relates to the failure of the Company to provide certain information requested by the Union to aid it in policing the Strike Settlement Agreements.⁶² The second involves the question of who should bear the cost of deletion of non-bargaining unit data from documents provided to the Union by the Company.

1. Failure to provide information.

In October 1960 the Union wrote letters to the Company requesting listings of:

1. Employees whose jobs were filled by replacements during the strike;

more, the Company's principal proposed basis for deferral—that the Board's findings paralleled those of the district court—only became apparent long after the hearing in this case when the decisions in the two cases had been rendered. The Board's findings were certainly not required to be parallel and indeed still ultimately may not be. While the Board might have as a matter of discretion stayed proceedings in the 301 case, it was not required to do so. Finally, while it is the duty of the Board not to condone undue delay in its processes and to take steps to eliminate it, we note the Supreme Court's observation in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-65 (1969): "[T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers."

- 62 It is by now well settled that the duty to bargain in good faith not only includes the obligation to provide a union with information relevant to the active bargaining, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970), but also information necessary and relevant to administer collective bargaining agreements already in force. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198 (2d Cir. 1970), cert. denied, 401 U.S. 993 (1971); *Prudential Insurance Company of America v. NLRB*, 412 F.2d 77 (2d Cir.), cert. denied, 396 U.S. 928 (1969).

2. Employees who were returned to their original jobs;
3. Employees recalled under paragraph 4(b) of the Agreements, showing their seniority status;
4. Employees recalled under paragraph 4(c) of the Agreements, with seniority status;
5. Employees on the preferred hiring list who were awaiting recall, showing their seniority status in their occupational group and seniority area.⁶³

Approximately a week later the Company responded as follows:

You now have in your possession the names of all striking employees who registered their desire to return to work, pursuant to the terms of this agreement—such information having been furnished to you by the Company in accordance with the request you made some time ago. No formal listings showing the information requested in your letter . . . are maintained by the Company. However, such data may be obtained through inspection of basic personnel records which are kept by the Company and the correlation of information so obtained with information already furnished by the Company.⁶⁴

The letter went on to state that the Company would not itself analyze its records and compile the desired information but did offer to make the appropriate records available to the Union.⁶⁵ However, the Union declined to avail itself of this opportunity.

⁶³ Joint Appendix (301 case) 1966.

⁶⁴ *Id.* 1968.

⁶⁵ The Company had responded in similar fashion to broad Union requests for information made in 1953, 1955, and 1958, i.e., with an offer to make relevant records available.

At this point, a brief discussion of the mechanics of administering the Agreements is in order. Because the Union's charges are directed most forcefully at Pratt & Whitney, allegedly the most flagrant violator of section 8(a)(5), this description will be confined principally to that division, although the procedure at Hamilton Standard did not differ materially. Immediately after the registration of all strikers desiring to return to work, a list of all registered strikers by job code and department was prepared. This list was intended to facilitate the recall of strikers to their old jobs under Phase 1. This list was "very short-lived" and almost immediately incorporated into a new list, which showed registered strikers by seniority area and occupational group.⁶⁶ This list was then broken up and distributed to the fifteen or so personnel advisors who were in charge of the recall of strikers in various sections of the East Hartford plant. At that time it was apparently contemplated that this list would be the principal record utilized by the Company for the recall of strikers. Before the end of August, however, it became apparent to Morse, Pratt & Whitney's personnel manager, that the list method was simply unworkable. The daily volume of employees recalled was substantial. Because not all those employees upon becoming eligible for recall responded either quickly or positively to an offer of reinstatement, the notations, erasures, and deletions on the list destroyed its utility. Although the list was never formally abandoned, Morse devised a system whereby still unrecalled strikers were transferred to a fictitious "Plant 90" for administrative purposes (comparable in some respects to "Plant 500" which was traditionally used for absentees). Personnel advisors filled out change of status slips for strikers still unrecalled by the time all available

⁶⁶ Joint Appendix (301 case) 812.

jobs in an occupational group and seniority area had been filled. These slips, then arranged by seniority within a particular seniority area and occupational group, became the functional preferred hiring list.⁶⁷

The Union contends that in light of the existence of the two lists already described, the Company's response to the October request was entirely unreasonable, and a breach of its duty to bargain in good faith. We disagree. While a better response by the Company would have at least described those materials, including the lists, used to administer the Agreements and being made available to the Union, the failure to do so in this case cannot be considered an unfair labor practice. The response of the Company was truthful, since in fact no formal listings of those recalled under the various phases were kept. The two lists did exist, to be sure, but by October Morse had long since concluded that the numerous markings and erasures had rendered them not a particularly useful tool for administering the Agreements. More importantly, the Company's response was not a refusal to supply information not existing in the precise form requested;⁶⁸ it was an invitation to the Union to examine those materials that the Company did have.⁶⁹

The union refused, apparently because two previous efforts in the 1950's to obtain useful information from records provided by the Company had been overly burdensome. But that was no justification for concluding that information pertinent to the Strike Settlement Agreements would be similarly unavailing. The type of information de-

⁶⁷ *Id.* 814-15, 821. These lists were apparently destroyed by the Company although the date of destruction was never established.

⁶⁸ See *NLRB v. General Electric Co.*, 418 F.2d 736, 752 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970).

⁶⁹ See *The Cincinnati Steel Castings Co.*, 86 NLRB 592 (1949).

sired in previous efforts had been for more extensive basic personnel and wage information on all employees in the unit. In contrast, the information sought by the October request was much narrower in scope. Moreover, by the very nature of the Strike Settlement Agreements, the Company would have had to devise some method, by list or otherwise, of segregating employees into occupational groups and seniority areas, for only then could the proper order of recall have been determined. Having itself steadfastly refused to examine what materials the Company might have provided, the Union cannot now charge the Company with an improper refusal to provide information. Morse testified in the 301 case that the Company would have provided the Union with the lists, had it accepted the invitation to examine records.⁷⁰ Presumably the change of status slip that constituted the preferred hiring list would have been provided as well. Failure to provide these basic records, which were obviously highly pertinent to the administration of the recall Agreements, after the Union had accepted the Company's invitation, plainly would have violated section 8(a)(5), but an inference that this is what would have occurred need not be drawn when the Union made no effort on its own behalf.

In November 1960, having still not examined Company documents relating to the administration of the Strike Settlement Agreements, the Union wrote a letter significantly expanding its information request. The Union sought *inter alia*, a current list of all employees in the bargaining unit with their dates of hire, classifications, job code, wage rates, shift assignments, departmental assignments, and their respective seniority, by department, occupational group, or seniority area. Also requested were special listings of employees hired since certain designated

⁷⁰ Joint Appendix (301 case) 938.

dates, for example, the date of the signing of the Strike Settlement Agreements. The request for a list of employees on the preferred hiring list was also reiterated.⁷¹

The Company again responded by letter:

If you do not have sufficient information upon which to base an informed judgment as to whether the company is complying with the terms of our labor agreements, it is only because your union has ignored our repeated offers to make available to the union detailed information concerning all employees in the bargaining unit. We will not, as we have told you before, undertake the clerical work and analyses of records necessary to furnish you with such detailed information as you requested in your letter of November 11, 1960, and as you requested many times in the past.⁷²

The Union contends that this response was unlawful because it did not disclose the existence of a bi-weekly "Employee Service Record." This was a computer printout produced every two weeks for use principally in the wage and salary section of the personnel office. It grouped employees having the same job code in order of seniority—that is to say, employees identically situated within the Company were shown together on the list. In addition to job code, the printout also gave each employee's occupational code and seniority in terms of date hired and the number of weeks served. Certain wage and rating data was also included. The list had routinely been produced since about 1950; however, it was not part of the materials that the Company had agreed by contract to provide the Union, and its existence had never been disclosed. The Union first became aware of its existence only when it was

71 *Id.* 1972-73.

72 *Id.* 1976.

mentioned by a Company data processing employee during the taking of a 1963 deposition.⁷³

The Trial Examiner characterized the Union's request as "an effort to create and augment self-serving evidence to support [unfair labor practice] charges . . . rather than a bona fide request for essential information." 192 NLRB at 427. And, indeed, given the failure of the Union to respond to the Company's October offer to make information available, its reply to the Union's sweeping requests made in November cannot be considered a breach of the Company's statutory duty.⁷⁴

The materials requested in the Union's October letters were obviously the information most relevant to the administration of the Agreements. Without the means to ascertain the relative seniority among registered strikers and the occupational groups of those still awaiting recall, the Union would have no way of knowing whether the recall of strikers was in accordance with the terms of the Agreements. As we have already observed, the Company's response to the October letter was under all the circumstances a reasonable one, and the Union at least had an

73 Before the Trial Examiner, the Union argued that the Company's failure to produce the "Employee Service Record" in response to the several comprehensive Union requests for information made in the 1950's was a violation of section 8(a)(5). The Union contended that the existence of the record had been fraudulently concealed, thereby tolling the statute of limitations. However, the Examiner ruled against the Union on this point, 192 NLRB at 424-25, and these pre-1960 matters have not been pursued here except by way of general background.

74 We need not decide whether in a different context the Company's failure to disclose the existence of the Employee Service Record would have been an unfair labor practice. That the list was not in the precise form requested by the Union would not alone relieve the Company of its obligation to disclose relevant and necessary information, where such information existed in some form useful to the Union. *NLRB v. General Electric Co.*, 418 F.2d 736, 752-53 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

obligation to test the Company's offer before charging it with failure to bargain in good faith. The Company's November response must be considered in light of the Union's own intransigence. Without current information on the strikers who had been recalled and those who remained on the preferred hiring list, the bi-weekly Employee Service Record would have been of no significant aid in policing the Strike Settlement Agreements. The bypass of an opportunity to obtain the tools basic to its policing of the Agreements rendered the Union's subsequent request overly broad and largely irrelevant for purposes of the Strike Settlement Agreements. It would be improper for the Union to use this subsequent request, which included more tangential materials, as the basis for an unfair labor practice charge when the Company's original response was adequate. Accordingly, we affirm the Board's conclusion that the Company did not violate section 8(a)(5).

2. *Costs of Providing Information*

We here deal with an issue not related to the 1960 strike and the Strike Settlement Agreements. In February 1964, after learning of the existence of the bi-weekly "Employee Service Record" and the comparable document at Hamilton Standard (the monthly "Personnel Data Listing"), the Union requested the Company not only to furnish it with copies of those documents on a continuing basis, but also to provide copies of a number of other Company personnel records, including such things as employee "put-on", "change of status", and "termination" slips that were routinely prepared by the Company personnel office.⁷⁵ The

⁷⁵ "Put-on" slips were completed whenever a new employee commenced work; "change of status" slips were made out whenever an employee's status was altered by, for example, a pay increase, transfer, or promotion; and "termination slips" used when an employee was terminated,

Company raised certain objections to providing this information, and a number of letters between the Company and the Union ensued. The final position of the Company was essentially that it would provide the records to the Union, but that the Union would have to pay the costs incurred thereby, including the cost of preparing the "Employee Service Record" and other documents by deletion of non-bargaining unit information contained in them.⁷⁶ This offer was not considered satisfactory, and the Board's General Counsel commenced a proceeding under section 10(j) of the Act⁷⁷ for an injunction compelling the production of the information requested. Thereafter, in a settlement of this 10(j) action, the parties stipulated that the Company would bear the costs attendant in supplying the information, pending an adjudication by the Board of its obligation to do so. The Union would in turn provide a surety bond to cover the costs in the event that the Board determined that they should be borne by the Union. The sum involved is not wholly insubstantial, having totaled approximately \$50,000 in less than four years running from the summer of 1964 to the spring of 1968.

The Board ruled that for the Company to insist on Union payment for preparation and reproduction of Company records was not a violation of section 8(a)(5). As to the costs connected with the reproduction of personnel docu-

resigned, died, laid off, or retired. Other materials demanded by the Union were "Employee Ranking Lists," "Employee Performance Ratings," "Physical Demands Records," "Functional Capacity Records," and "Employee Classification Records."

⁷⁶ The Pratt & Whitney "Employee Service Record" included in its listing employees not at the East Hartford plant and therefore not represented by Lodge 1746. It also included hourly employees such as plant guards and supervisors who, although employed at East Hartford, were not a part of the bargaining unit represented by the Lodge.

⁷⁷ 29 U.S.C. §160(j) (1970).

ments (both labor and materials), we fully agree with the Board's conclusion. This was not a one-shot request for information to aid in the negotiation of a particular point. The amount of material requested by the Union was substantial,⁷⁸ and copies were desired on a continuing basis. The Company could have made the documents available at reasonable times and places for the Union to copy them. *The Cincinnati Steel Castings Company*, 86 NLRB 592, 593 (1959). And under those circumstances, the Union would have had to pay the costs involved.

However, with respect to the cost of deletions of non-bargaining unit information from the "Employee Service Record" and certain other documents, we differ with the Board. Concededly, information on non-bargaining unit employees was not relevant to any purpose expressed by the Union, and accordingly, the Union had no statutory right to receive it.⁷⁹ But such information was deleted solely at the insistence of the Company. The Union was indifferent as to whether it was included or not.⁸⁰ Moreover, the Company gave no reason for insisting on deletion, such as confidentiality or privilege,⁸¹ beyond the fact that

78 According to a letter sent by the Company to the Union and quoted by the Trial Examiner, personnel adjustments in the 16,000-employee bargaining unit at East Hartford annually generated several thousand "put-on" and "termination" slips and between forty and fifty thousand "change of status" slips. 192 NLRB at 434.

79 In contrast, the Board seems to have found that the information requested, insofar as it related to bargaining unit employees, was relevant and necessary, a conclusion not challenged by the Company. See 192 NLRB at 390.

80 In its initial request for a copy of the "Employee Service Record," the Union expressly stated that the Company, if it so chose, could omit employees outside the bargaining unit. 192 NLRB at 429.

81 See generally *Emeryville Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971); *Texaco Inc. v. NLRB*, 407 F.2d 754 (7th Cir. 1969); *Kroger Co. v. NLRB*, 399 F.2d 455 (6th Cir. 1968); *American Cyanamid Co.*, 129 NLRB 683 (1960).

the Union had no statutory right to receive it. While the Company was certainly not required by the Act to make irrelevant information available, and therefore violated no statute by deleting it, neither did it have the right, for its own unspecified purposes, to in effect tax the Union on the receipt of information which was necessary and relevant to the Union's role as collective bargaining representative.⁸² Accordingly, we hold that making the Union pay for the deletion of non-bargaining unit information was improper.

The record does not presently contain an accounting of costs incurred by the Company which is detailed enough to distinguish between reproduction and deletion costs. Unless the parties can agree on the breakdown, the amount owed by the Union will have to be determined by the Board during the compliance stage of this proceeding.

E. The Company's Institution of a Civil Damage Suit

Without success, the Union contended before the Board that the Company's threat to file, and the actual filing of, a lawsuit to recover for property damage sustained as a result of striker violence restrained and coerced employees in violation of section 8(a)(1) of the Act. The Company ultimately received a favorable verdict in the Connecticut Superior Court in excess of 1.7 million dollars. The judgment was affirmed as to liability by the Connecticut Supreme Court but remanded on the damages issue. *United Aircraft Corp. v. International Association of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972).

Briefly, the pertinent facts as found by the Trial Examiner can be summarized as follows. As early as Septem-

82 Testimony by a Pratt & Whitney data processing employee indicated that the computers could easily be reprogrammed to provide the "Employee Service Record" with non-bargaining unit employees deleted. Joint Appendix (301 case) 178.

ber 1960, Plato E. Papps, General Counsel for the Union, complained that the Company was not living up to the Strike Settlement Agreements and threatened to file 3,000 unfair labor practice charges. Company Vice President Martin Burke then retorted "I will sue you." The Union filed charges with the Board soon thereafter, but nothing more was said about a Company suit until a January 1962 meeting called by Company and Union officials for the purpose of negotiating an overall settlement of both the 301 breach of contract suit and the unfair labor practices filed with the Board. Then Burke said that the Company was going to sue the Union for strike-related property damage unless the entire controversy could be settled. After this meeting, further NLRB proceedings were postponed at the joint request of the Company and the Union. In December 1962, Burke again indicated in a telephone conversation with Papps that the Company was going to file suit against the Union unless the entire matter was settled. At a meeting soon thereafter, in January 1963, the parties again met to negotiate a settlement. The Company contended that only about 300 strikers had not been restored to work by that time and offered to open its records to the Union. Papps then told Burke that there was no point in going to the Company's offices to look at records because the district court would soon order the records produced. Burke then said that the Company was prepared to file suits against the Union for \$15,000,000.⁸³ Papps offered \$65,000 or \$68,000, but his offer was ignored. After the January meeting, there were no further settlement discussions, and in

83 The Union attaches some importance to the fact that never before had Company officials mentioned anything over \$1,000,000. However, this escalation of the amounts involved cannot in this context form the basis of an unfair labor practice charge. Obviously Papps, an experienced lawyer, knew that if the Company filed suit it would seek the maximum damages possible and further that a court would not award more than was deserved.

May 1963, the Company filed its complaint in the Connecticut Superior Court.

On these facts, the Board determined that the Company had not violated section 8(a)(1). We agree.

A threat to file a lawsuit unless unfair labor practice charges are withdrawn can under certain circumstances violate the Act. *Clyde Taylor Co.*, 127 NLRB 103 (1960). However, here the Board determined that the Company's "threat to file such a suit unless an overall settlement agreement was reached was not the kind of 'tactic calculated to restrain employees in the exercise of rights guaranteed by the Act' envisaged by *Taylor* Rather, it appears to [have been] part of a good-faith attempt to negotiate a settlement of the numerous claims arising out of the bitter 1960 strike, with each party giving up its claims against the other." 192 NLRB at 384 (footnote omitted). There is ample support for this conclusion. The "threats" in this case were not conveyed by an employer to a single employee; they were an integral part of negotiations in which both sides were represented by sophisticated labor counsel who were more than familiar with the rights of the parties, and particularly the right to file unfair labor practice charges with the Board. Cf. *West Point Pepperell, Inc.*, 200 NLRB 1031 (1972). The grounds for the Company's suit were not fabricated, as subsequent events proved, and they were related to Union unfair labor practice charges in the sense that both arose out of the same strike. It was quite natural, therefore, that Company claims would be brought up and discussed in the overall settlement negotiations.

Likewise, the actual filing of the suit was not an unfair labor practice. The Board relied on *Clyde Taylor Co.*, *supra*, which, in addition to holding that threatening a suit could be an unfair labor practice, also held that the actual institution of the suit did not violate the Act. On

the latter point the Board reasoned that a contrary result would deny "the normal right of all persons to resort to the civil courts to obtain an adjudication of their claims." 127 NLRB at 108.

Clyde Taylor overruled *W. I. Carter & Bro.*, 90 NLRB 2020 (1950), and adopted the reasoning in the dissent of Chairman Herzog in that case. *Carter* had expressly recognized that the right to resort to the courts is not absolute, but rather limited by the law of malicious prosecution and abuse of process. *Id.* at 2024. On the other hand Chairman Herzog reasoned that despite the possible existence of an improper motive in bringing a suit, the "Board should accommodate its enforcement of the statute to the traditional right of all to bring their contentions to the attention of a judicial forum, rather than hold it to be an unfair labor practice for them to attempt to do so." *Id.* at 2029. The Union asks this court to hold that *Carter* was a sounder construction of the Act than the Board's more recent decision in *Taylor*. We conclude, however, that it is unnecessary for us to reach this issue. First of all, there is no evidence indicating that the suit was filed to induce the Union to withdraw its charges pending before the Board.⁸⁴ But even if we assume that the Company was improperly motivated—that it intended the suit to induce the Union to withdraw its charges—this alone would not make resort to the courts unlawful so as to justify an unfair labor practice finding. Abuse of process requires more than simply improper motive.⁸⁵

⁸⁴ In this connection, the Board quoted a finding of the Connecticut Superior Court that the Company did not "use these lawsuits for bargaining purposes to induce the defendants to withdraw their claims in the United States District Court. 70 LRRM 2577, 2580." 192 NLRB at 384 n.13.

⁸⁵ Since the Company unquestionably had probable cause to file a suit in this case, there is no allegation of malicious prosecution. Abuse

There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question, for example, improper use of a subpoena. W. Prosser, *LAW OF TORTS* § 121 at 857 (4th ed. 1971); F. Harper & F. James, *THE LAW OF TORTS* § 4.9 at 330-33 (1956). Here there is no indication that the Company did anything other than pursue the state proceedings to their proper conclusion. Accordingly, at least on these facts, the Board's reliance on *Clyde Taylor* was proper.

F. Independent Violation of Section 8(a)(1)

The Board found that the Company violated section 8(a)(1) of the Act through the misconduct of five of its supervisors⁸⁶ and that these violations warranted remedial relief in the form of a cease and desist order and posting of a notice. The unlawful activities of the supervisors took place either during the strike or when it was imminent and consisted of threats, interrogation of employees, and offers of increased benefits to strikers if they returned to work. Having reviewed the Board's findings, we hold that there was ample basis for a conclusion that the conduct of the supervisors violated the Act. The Company asserts that these violations were trivial in the context of plants which employed approximately 20,000 people and including nearly 1,000 foremen and therefore did not warrant a remedial order. However, whether these violations warranted remedial relief lies within the broad discretion granted to the Board by section 10(c) of the Act,⁸⁷ and we are not inclined to dis-

of process, however, does not depend upon whether or not the action was brought without probable cause or upon the outcome of the litigation.

⁸⁶ The complaint charged violations on the part of 64 supervisors.

⁸⁷ 29 U.S.C. §160(c) (1970).

turb the exercise of that discretion in this case. See *NLRB v. Long Island Airport Limousine Services Corp.*, 468 F.2d 292, 296 (2d Cir. 1972); *Luxuray of New York Division of Beaunit Corp. v. NLRB*, 447 F.2d 112, 114 (2d Cir. 1972).

The petition of the NLRB to enforce its order is granted insofar as the order relates to violations of section 8(a)(1) committed by Company supervisors. In all other respects the petition for enforcement is denied. The Union's petition for review is granted insofar as it relates to the promotion and transfer of active employees prior to December 31, 1960, the reinstatement of non-striker absentees, and the payment of costs of deleting certain information on documents provided to the Union, and the case is remanded to the Board for further proceedings consistent with this opinion. In all other respects the petition for review is denied.

The parties shall each bear their own costs incurred in connection with this appeal, except that the cost of printing the appendix shall be borne equally among the parties.

[Filed March 29, 1969]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 9084

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO, *Plaintiff*,

v.

UNITED AIRCRAFT CORPORATION, *Defendant*.

Civil Action No. 9085

LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO, *Plaintiff*,

v.

UNITED AIRCRAFT CORPORATION, *Defendant*.

Memorandum of Decision

T. Emmet Clarie, U.S.D.J.

The plaintiff unions commenced separate actions in this Court on December 11, 1961, pursuant to § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185; thereafter on July 22, 1963, by consent of the parties, these suits were consolidated for trial. The plaintiffs seek a declaratory judgment that the Pratt & Whitney Aircraft Division and the Hamilton Standard Division, both subsidiaries of the defendant parent corporation, breached the terms of the Strike Settlement Agreements made in August 1960. They seek an order for specific performance and a judgment for substantial monetary damages. The unions' claims include remedial damages to the individual union members affected, institutional damages to the plaintiff

unions, and punitive damages to deter the defendant from future unlawful conduct; in addition thereto, the plaintiffs request an allowance sufficient to pay counsel fees and the expenses of this litigation.

The original complaints contained a single count and alleged a breach of the Strike Settlement Agreements. Subsequently a consolidated amended complaint, drawn in four separate counts, was filed on November 30, 1964. The first count alleges that the defendant failed to reinstate strikers in accordance with the terms of the Strike Settlement Agreements, and that its conduct was motivated by a desire to protect those employees who helped break the strike. The unions represent that the defendant's strike period hirings, promotions, and transfers were not permanent replacements of strikers and that since the execution of the agreements in August 1960, the unions' membership has been unlawfully deprived of its employment. The second count, in addition to reiterating the averments of the first count, claims that the strikers were entitled to reinstatement as a matter of law, because the strike was caused or prolonged by the defendant's unfair labor practices. The third count incorporated the material allegations of the first count and further asserted that the defendant contrived to curtail its employee complement immediately after the strike and during the effective period of the "preferred hiring list," in order to deprive those strikers who were awaiting recall from the full enjoyment of their employment and seniority rights. The fourth and final count, in addition to reasserting the allegations of the prior counts, represents that the defendant unlawfully deprived and prevented the plaintiffs from effectively policing and enforcing the defendant's compliance with the Strike Settlement Agreements. Upon defendant's motion, count two and paragraph 19(c) of count four (which alleged unfair labor practices on the part of the defendant in failing to furnish records dating back to 1953) were dismissed by order of

the Court on June 16, 1965, because the subject matter alleged and the remedies sought were not within the jurisdiction of this Court.¹

The plaintiff unions and the defendant employer have polarized their respective positions, so that the Court is asked to draw widely dissimilar conclusions from the facts presented in evidence. The plaintiffs have attempted to demonstrate that the defendant corporation deliberately designed and developed a "master plan" to minimize the number of registered strikers who would be rehired and to relegate to inferior jobs many strikers who were recalled, so that the union membership would be taught a lesson, thereby weakening the local unions and minimizing their organizational effectiveness.

Demonstrative of the existence of such a plan and the defendant's anti-union animus generally, they point to certain threats attributed to defendant's representatives on the occasion of the local union leaders' refusal to recommend the terms of a tentative settlement negotiated and recommended by the plaintiffs' general counsel on or about July 7, 1960. At that time the defendant's Vice-President Burke is reported to have said "We are going to get you. We are going on a full scale hiring program"; and in similar vein the defendant's counsel purportedly admonished his adversary with the warning, "We're going to see to it that there isn't another strike at United Aircraft for fifteen (15) years." (DX-74).² While the statements standing alone express an attitude of measured hostility, when considered in the light of the circumstances in which they were

¹ *Lodge 1746 and Lodge 743, IAM v. United Aircraft Corp.*, Civil No. 9084 and No. 9085 (D. Conn., filed June 16, 1965).

² In this Opinion the following abbreviations will be used in reference to the basic trial record:

DX— Defendant's Exhibit
PX— Plaintiffs' Exhibit
Tr. Transcript of the trial

said, they have the appearance of being the normal aftermath of heated and frustrated negotiations, which terminated in the aborting of an otherwise prospective peaceful labor relations settlement.

From the opposite end of the spectrum, the defendant-company points to the admissions by plaintiffs' general counsel, that these strikes at defendant's plants were ill-conceived by local union leadership at the outset and had already been lost, when he first arrived on the scene to negotiate. (Tr. 8920). He denied any recollection of a 1961 conversation, wherein defendant's counsel inquired of him why he had started this mammoth litigation, knowing there had been no violation and his giving a reply that the union was dead and he had to do something. (Tr. 9001). However, when asked if he told defendant's counsel, that he had hired plaintiffs' present trial counsel for the sole purpose of coming to Connecticut and litigating these suits, just as a means of keeping the union alive, he replied, "I could have said that." (Tr. 9006). If this were true, such a statement would strongly suggest a completely unjustifiable and unethical motive for the plaintiffs initiating this protracted litigation.

Mindful of the philosophic and descriptive warning of the essayist, that "all looks yellow to the jaundiced eye," the Court, aloof from the natural emotional involvement of the parties, will not attempt to filter the motives, the alleged animus, or subjective suspicions of either of the litigants through any amber or rose-colored prism; but rather it will attempt to bring the conduct of both parties into focus, in the light of every day human experience and the tests of objective reality. In so doing, the Court will ascertain the true legal measure of their conduct in faithfully carrying out their respective obligations under the Strike Settlement Agreements.

GENERAL FACTUAL BACKGROUND

Local Lodges #1746 and #743 are both labor unions within the meaning of § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and are affiliated with the International Association of Machinists. For many years Lodge #1746 had been the exclusive bargaining agent for the employees in the East Hartford and Manchester plants of the Pratt & Whitney Aircraft Division and prior to the strike had approximately 6,500 members (Tr. 1547); and Lodge #743 had similarly been the lawful bargaining agent for the employees in the Windsor Locks and Broad Brook plants of the Hamilton Standard Division. (Tr. 3254).

Pratt & Whitney, the largest of the defendant's subsidiaries, is primarily engaged in the production of multiple types of jet engines for aircraft, utilities, ships, industrial and transportation installations, as well as rocket engines for spacecraft. Its principal plants in Connecticut are located in East Hartford, Manchester, North Haven, Southington, Middletown and Meriden. At the time of this labor dispute in 1960, the East Hartford and Manchester plants, represented by Lodge #1746, employed between 15,000 and 16,000 hourly paid employees; however, it should be noted that the Manchester plant had only 140 employees, and each plant was treated by the parties as a separate entity for purposes of collective bargaining. The labor contracts in both units expired December 4, 1959.

Hamilton Standard's main plant at Windsor Locks employed approximately 5,000; the Broad Brook plant employed only 400. The larger factory manufactured airplane propellers, fuel controls for jet engines, aircraft air conditioning systems, electronic components, controls and related items. The smaller plant produced and assembled electronic devices exclusively. Separate labor contracts for these two plants existed with Lodge #743.

As a prelude to the strike, during the period 1959-1960, a Union Unity Program was initiated on a national level between the International Association of Machinists representing the employees at the defendant's East Hartford, Manchester, Southington, Meriden and Middletown plants with representatives of the United Automobile Workers' Union, which represented employees in the defendant's North Haven and Stratford (Sikorsky) plants. (Tr. 2953-4). The bargaining committees and membership in the Southington, Meriden, and Middletown plants subsequently negotiated and ratified a three (3) year agreement on December 4, 1959, but the membership of Lodge #1746 refused to approve it. The Hamilton contract expired April 21, 1960; the Sikorsky contract in February 1960; the North Haven plant, May 15, 1960. The latter unions announced uniform objections and advanced a common strike date. (Tr. 2963-68). The primary issues were: (1) a union shop; (2) plant-wide seniority; (3) automatic wage progression; (4) promotions on the basis of strict seniority; and (5) unrestricted arbitration. (Tr. 2969). It is not relevant or significant to consider here the factors which led to the settlement of the disputes in the other plants; for our purpose, only Pratt & Whitney Lodge #1746 and Hamilton Lodge #743 are the subject matter of this litigation.

The plaintiffs commenced their strike against both Pratt & Whitney and Hamilton simultaneously on June 8, 1960 and for nine weeks a major power struggle ensued as a result of the unions' attempt to force the defendant to grant increased economic concessions to the employee-unions. The strike was marred by employee violence with resulting mutual antipathy on both sides, which culminated in state court judgments for substantial damages against both plaintiff unions.³

³ *United Aircraft Corp. v. IAM and Local 1746*, Civil Action No. 133884, State Superior Court, Nov. 26, 1968. Judgment now on cross-appeals; awarding plaintiff to recover of defendants

When settlement discussions appeared to reach an impasse, the International Union sent its general counsel from its Washington, D.C. headquarters to attempt an amicable settlement. It appeared at first that his efforts and suggested recommendations would solve the impasse; but on or about July 7, 1960, it became apparent that the local union leaders were resisting his proposed settlement terms. The general counsel then withdrew his active participation in the negotiations, until he might be given a more meaningful authority to effect binding negotiations with the active backing of the local unions' leadership. (Tr. 9006; DX-75).

On or about July 18, 1960, the local leadership agreed to recommend to its members any agreement he might negotiate and approve. (Tr. 8921). The plaintiffs' general counsel then resumed negotiations and a mutually acceptable agreement was worked out, on terms which would have settled the strike. The details were expressed and documented in a set of written notes compiled by the plaintiffs' and the defendant's attorneys. (Tr. 8923; PX-310; DX-20; see also DX-76). Although the bargaining committees for the unions had agreed to support and recommend the terms of such a settlement, when the time came to submit the proposal to the membership for ratification on July 23, 1960, the union bargaining committees declined to recommend acceptance (Tr. 8812, 8923) and the membership voted down the proposed settlement by a vote of approximately 3,800 to 300. (Tr. 8836). This meeting of the membership, became so tumultuous, violent, and out of hand, that the general counsel feared for its own personal safety and he too re-

\$1,369,725.25 damages, with statutory interest thereon from August 12, 1960, \$197,333.33, exemplary damages and costs taxed at \$739.90.

Also: *United Aircraft Corp. v. IAM and Local 743*, Civil Action No. 133885, Superior Court, Nov. 26, 1968. Judgment now on cross-appeals; awarding plaintiff to recover of defendants \$88,622.00, with interest thereon from August 12, 1960, \$98,666.67, exemplary damages, and its costs taxed at \$241.70.

frained from recommending ratification. At this point he left town and declined to participate further in any negotiations in behalf of the local unions. (Tr. 8834-35).

The Governor of Connecticut arranged a meeting in New York City on August 5, 1960, between a few key officials of the defendant corporation and the national president of the International Union and its general counsel. While the evidence discloses substantial agreement between the parties on much that was discussed and orally agreed to at this informal meeting, there was violent disagreement at the trial on whether the new terms agreed to were substantially identical with those rejected by the membership on July 23, 1960. Papps, the plaintiffs' general counsel, claimed that Burke, the defendant's Executive Vice-President and negotiating representative, referred to certain written notes at the August 5th conference (PX-312; Tr. 8843) which had been mutually prepared by the parties prior to the abortive membership meeting of July 23rd and that the latter agreed the terms of settlement would embody the same "package." The defendant, through Burke, vigorously and steadfastly denied that this conversation ever occurred or that any such document was ever shown to him on that occasion.

It was mutually agreed at the New York conference that the strikers who desired to return to work would register; that those who had engaged in misconduct during the strike would have their cases reviewed by a panel of arbitrators (Tr. 9014-17; DX-76); that those who returned to work by September 1, 1960 would not lose their continuity of seniority, because of absence during the strike, but those who returned between September 1 and December 31, 1960 would receive vacation pay. It was mutually understood that all strikers who registered would not be immediately returned to work, because both divisions of the defendant corporation had been hiring permanent replacements, since July 11, 1960. The terms governing wages, hours, and working conditions would be the same as previously proposed under

the tentative agreement reached for a new labor contract on December 4, 1959, except that there would be no "wage reopener"; in its stead a general wage increase of from seven (7) cents to twelve (12) cents per hour would become effective January 2, 1961. As a further consideration, the defendant agreed to withdraw a petition it had filed with the NLRB, wherein it requested that an election be ordered to determine whether or not the union represented a majority of defendant's employers at Pratt & Whitney.

Upon returning to Hartford, the defendant's representatives met the following day with Grand Lodge representative, Richard Thurer, who had previously represented both plaintiff unions in the contract negotiations. The purpose of the meeting was to explain and iron out with the local union officials the detailed terms and administrative procedures which would be followed based upon the tentative agreement reached in New York on the previous day. It was fully explained and understood that all strikers who registered would not be immediately returned to work, because their jobs had already been filled during the strike by permanent replacements. Hamilton's estimate was that the non-returning personnel would approximate between 400-500; at Pratt & Whitney the number was believed to be much greater.

The defendant explained that the hiring of permanent replacements for both divisions was still going on every day and even if the strike were settled within the next few days, there would be a number of people who had already been hired, who would still be reporting to work within the next two weeks. It was explained further that those for whom jobs were not immediately available would be placed on a preferred hiring list until December 31, 1960, when their preferred status would expire.

Pratt & Whitney Lodge #1746 scheduled its membership ratification meeting for August 7, 1960, while Hamilton

Standard Lodge #743 called its meeting for the following day. The membership of Lodge #1746 originally rejected the proposed settlement agreement. However, when Lodge #743 accepted the proposal the next day, Lodge #1746 called another meeting for August 9, 1960, at which its membership reconsidered its prior action and ratified the proposed settlement agreement. Simultaneously, at these same membership meetings, the unions approved new collective bargaining labor contracts governing working conditions, wages, and union recognition.

The registration of strikers commenced at Hamilton August 9th, the day after ratification; 1,721 registered at the Windsor Locks plant and 300 registered at the Broad Brook plant. Union representatives participated in the registration procedures and simultaneously recorded the identity of the registrants. Registration at Pratt & Whitney commenced on August 11, 1960 and with few exceptions, it was completed on the 13th. Approximately 4,515 strikers registered at East Hartford and 20 at Manchester. The defendant subsequently supplied Lodge #1746, at the latter's request, with a list of all strikers who had registered. (PX-160).

The Strike Settlement Agreements drafted by the defendant (Tr. 3009-10) were reduced to writing and executed by the parties on August 11th, 1960. The company represented that these were modeled after the strike settlement agreement originally proposed by Seminole Lodge #971, an affiliate of the plaintiffs' International Union, and previously accepted by the defendant as a basis for settling the strike at the latter's Florida plant on July 15, 1960. (Tr. 3016-17; DX-5).

EXPLANATION OF TERMS

In order to clarify the terms used in this opinion relating to the company's use of personnel classifications, the Court hereby outlines their meaning.

Job Code: It is a number used to designate a particular set of duties, responsibilities and functions which have been drawn together in a single job assignment and to which a job title is affixed. (Tr. 4740-41, 80-81).

Based on his job code, an employee is classified in a seniority area and in an occupational group. These latter classifications are important because an employee ordinarily has seniority and thus recall preference during periods of layoff within his seniority area and occupational group.

Seniority area: At Pratt & Whitney it consists of a group of departments in an administrative area, which are grouped and given a number; each area is treated as if it were a separate plant. Since 1960, Hamilton has grouped some of its departments into seniority areas but others are separate and distinct. (Tr. 453-6).

Occupational Group: A group designation used to identify a class of skills that have a commonality, but which are not interchangeable, except as within a seniority area. There were 116 such groups listed in the Pratt & Whitney labor contract; however, the same group might appear in 10 to 20 different seniority areas and thus there were a total of approximately 440 occupational groups spread over 23 seniority areas. (Tr. 5360-63; 4742-44).

Seniority: Means the number of work weeks prior employment with this employer, with which the employee is credited under the labor contract. This seniority does not cross seniority area lines either contractually or as

a matter of practice. Seniority ordinarily gives a senior employee priority in being retained during layoff over less senior employees; and the right of recall in the same occupational group and seniority area over other employees of lesser grade. (Tr. 5369-71). Seniority code #1 commences with the first week of January 1925, the year the defendant was founded; subtracting the code number from the current week number would disclose the employee's weeks of seniority, provided they have not been interrupted. (Tr. 5506).

Demonstrated ability: One who had previously done the job and demonstrated his ability. (Tr. 3015).

Shifts: *Pratt & Whitney:*

1st shift: 7:00 A.M. to 3:30 P.M.
2nd shift: 3:30 P.M. to 12:00 midnight.
3rd shift: 12:00 midnight to 7:00 A.M.
(Tr. 1469-71).

Hamilton:

1st shift: 7:30 A.M. to 4:00 P.M.
2nd shift: 4:00 P.M. to 12:30 A.M. (one-half hour for lunch) (Tr. 1732).

Labor Grade: The highest labor grade at Pratt & Whitney is l.g. #1; the lowest is l.g. #11. Grades #9 through #11 are unskilled jobs. (Tr. 611, PX-93). At Hamilton the highest labor grade is l.g. #1; the lowest is l.g. #12. (PX-95, PX-97, PX-154, PX-155; Tr. 2024-25).

Rates: In each labor grade there are four (4) steps within the rate range reached through a merit rating system. "J" rate is

job rate; "R" rate above standard; "P" rate is premium; and "T" rate is top. (Tr. 1423, 2738).

Straight Time:

Hours worked during scheduled "standard pay period," which is not compensated for at overtime rates. On the third shift this actually means working six and one-half hours while being paid for eight hours. (Tr. 8470).

THE AGREEMENTS

The written agreements as drafted were basically alike, except that paragraphs 4(b) and 4(c) of the recall provisions in the Hamilton contract introduced the element of "demonstrated ability" in addition to the seniority factor as criteria for recall. This essential difference must be continuously borne in mind, when any attempt is made to treat the two agreements as if they were the same, in respect to the recall of registered strikers. (Tr. 242). At the August 11, 1960 meetings, where the agreements were signed, the representatives of Hamilton Lodge #743 requested no changes in the Strike Settlement Agreement, except that paragraph 4(b) be changed to read, that if a striker's pre-strike job was not available, he would be returned to a "comparable job." The defendant consented to this change and the original phrase "treated as if they had been laid off" was deleted. The word "comparable" was inserted before the phrase "or other available jobs."

The Hamilton agreement provided that registered strikers would be recalled to work in the following manner:

"(a) If the job held prior to the strike (i.e., same job code, department, and shift) is available, the registering striker will be returned to that job.

"(b) If such job is not available, strikers will be recalled to comparable or other available jobs in accord-

ance with their seniority and demonstrated ability pursuant to Article VII, Section 1 and 2, of the Windsor Locks contract ratified by the union on August 8, 1960, or pursuant to Article VII, Section 1, of the Broad Brook contract ratified by the union on the same date.

“(c) Strikers for whom no job is available in accordance with (a) and (b) above will be placed on a Preferred Hiring List and will be recalled to *job openings which develop* at any time prior to January 1, 1961, *before new employees are hired*. Employees on such Preferred Hiring Lists will be recalled to job openings in the order of their seniority and demonstrated ability pursuant to Article VII, Section 1 and Section 2, of the Windsor Locks contract ratified by the union on August 8, 1960, or pursuant to Article VII, Section 1, of the Broad Brook contract ratified by the union on the same date.

“Separate Preferred Hiring Lists shall be established for returning strikers employed at the Windsor Locks plant and those employed at the Broad Brook plant.” (Emphasis added.) (Exhibit A to the Consolidated Amended Complaint).

The Pratt & Whitney Lodge #1746 representatives executed the proposed draft in its original form as presented by the defendant without any change. Paragraph 4(a) was identical with that at Hamilton in respect to the recall of registered strikers to the same job held prior to the strike, if it was available; but the provisions of paragraphs 4(b) and 4(c) established different criteria for the recall of the remainder. It provided:

“(b) If such job is not available, strikers will be treated as if they had been laid off, and will be recalled to other available jobs in their occupational groups and seniority areas in accordance with their seniority, pur-

suant to Article VII, Section 1 and Section 2, of the contract ratified by the union on August 9, 1960.

“(c) Strikers for whom no job is available in accordance with (a) and (b) above will be placed on a Preferred Hiring List and will be recalled to job openings in their occupational groups and seniority areas which develop at any time prior to January 1, 1961 *before new employees are hired*. Employees on such Preferred Hiring Lists will be recalled to such job openings in the order of their seniority pursuant to Article VII, Section 1 and 2, of the contract referred to above.

“Separate Preferred Hiring Lists shall be established for returning strikers employed at the East Hartford plant and those employed at the Manchester plant.” (Emphasis added.) (Exhibit B to the Consolidated Amended Complaint).

The Hamilton Strike Settlement Agreement provided that if the identical job was not available, strikers would be recalled to comparable or other available jobs in accordance with seniority and demonstrated ability, as is provided in Article VII, §§ 1 and 2 of the labor contracts. (PX-95, Windsor Locks plant; PX-97, Broad Brook plant). Article VII, §§ 1 and 2 referred to the terms of layoff and recall because of lack of work. It recognized the principle of recall to specified seniority areas based not alone on seniority, but required that there be weighed with it the additional element of “demonstrated ability.” Under layoff circumstances, the labor agreements at Hamilton authorized management to offer a transfer to an employee scheduled to be laid off in one seniority area, to a job in a different seniority area; and to recall a person laid off in one seniority area to a job in a different seniority area, provided no other laid off employee had greater seniority in that area. These seniority areas are defined in Appendix B of the Windsor Locks contract and there are a total of twenty-six (26).

Fourteen comprise a single department, eleven (11) comprise two departments and one (1) is made up of four departments. The Broad Brook agreement is the same as that in Windsor Locks, except that it identifies seniority areas by individual departments.

In comparison, paragraph 4(b) of the Pratt & Whitney settlement agreement simply provided, that where the strikers' identical pre-strike jobs were not available, they would be treated as if laid off and, based solely on their seniority, would be recalled to other available jobs in their respective "occupational groups and seniority areas"; the element of "demonstrated ability" was not contained in the Pratt & Whitney agreement. Article VII of the Pratt & Whitney labor contract (PX-93) provided for recall to "noninterchangeable occupational groups within specified seniority areas" in accordance with the principles of seniority. It also permitted management to offer a transfer to an employee scheduled to be laid off from a job in a different occupational group or to recall an employee laid off from one occupational group to a job in a different occupational group, provided no laid off employees had greater seniority in that area. These occupational groups and seniority areas are defined in Appendix B and C of the Pratt & Whitney labor contract. It allows for 116 occupational categories arranged by groups into 23 seniority areas.

Paragraph 4(c) in both Strike Settlement Agreements was substantially the same. It provided that strikers for whom no job was available in accordance with paragraphs 4(a) and 4(b) would be placed on a Preferred Hiring List and recalled to job openings which developed at any time prior to January 1, 1961, before new employees were hired, pursuant to Article VII, §§ 1 and 2 of the respective labor contracts. The criteria for the order of recall differed because the Hamilton labor contract permitted recall to the striker's "pre-strike seniority area" and to a comparable job where he had "demonstrated ability." Pratt & Whit-

ney's labor contract, on the other hand, provided more limited guidelines of recall, conditioned solely on there being a job *available* in the striker's "pre-strike seniority area and noninterchangeable occupational group."

The collective bargaining labor contracts were incorporated by reference in these Strike Settlement Agreements, and they reserved to management in the "Witnesseth Clause," "the sole right and responsibility to direct the operations of the company." This reservation specifically included the right to select, hire, promote, demote, and transfer employees, unless otherwise provided by the contract. This reservation of authority was further strengthened by a supplemental agreement to both the Hamilton and Pratt & Whitney labor contracts dated August 16, 1960. In this supplemental agreement the parties attempted to further clarify their intent and define the prerogatives of management, reserved in the "Witnesseth Clause." It stated that these reservations could not be lessened, diminished, or affected by the powers entrusted to an arbitrator; and provided: (1) Management's right to determine the size and number of the working force in the active employ of the Company; (2) Its right to determine whether the Company's work should be performed by employees of the Company or by independent contractors; (3) Its right to determine the identity of Company's personnel to whom work shall be assigned; (4) Its right to determine whether transfers, promotions, or demotions are to be made; and (5) The identity of, or the number of new employees to be hired. (PX-93, following Appendix "C"; PX-95, PX-97).

The parties executed an arbitration agreement on August 24, 1960, affecting the eligibility of 50 registered strikers (Tr. 9032) who had been accused by the defendant of strike misconduct. It provided for the appointment by the Chief Justice of the State Supreme Court of a panel of three arbitrators, to consider whether this alleged misconduct warranted a refusal of management to accord them full

recall rights. Before final adjudication by this panel, three accused employees resigned and their cases were considered moot; seven were withdrawn from consideration by the plaintiff and abandoned; four were withdrawn by the defendant and the validity of their rights as registered strikers consented to by the defendant; six were found not guilty of misconduct by the panel and thirty were found guilty. Of this latter number, fifteen were ordered deprived of all rights of recall and ten were placed at the bottom of the "seniority area and occupational group listing." Two were rehired and returned to work on December 5 and 6, 1960. In the remaining five cases, the arbitrators held that they should be deprived of periods of seniority ranging from one to three years. Of these, one was reached on the preferred hiring list and returned to work December 5, 1960.

Thus there were three sets of interrelated agreements between the parties which were instrumental in settling this strike; all of these must be weighed and considered in defining the parties' intentions and conduct:

- (1) The Strike Settlement or Recall Agreements dated and executed August 11, 1960;
- (2) The collective bargaining labor agreements dated August 9, 1960 and executed August 16, 1960; together with the supplemental memorandum agreement of August 16, 1960, designed to clarify the meaning of the management prerogatives reserved to the defendant company in the "Witnesseth Clause" of the contract.
- (3) The arbitration submission of August 24, 1960, relating to the fifty (50) strikers whose strike misconduct was challenged by the defendant, as grounds for forfeiting their rights to recall.

During the lengthy Court trial, multiple tangent issues were injected into the controversy by the litigants. Cog-

nizant of the broad spectrum of human relationships involved in any labor relations litigation and being desirous of avoiding the omission of any significant issues in dispute, the Court requested the parties to submit a statement of the factual and legal questions, which they considered essential. The Court suggested that the parties stipulate to an agreed statement of issues, with the understanding that in doing so, they would not be considered as waiving any factual or legal claims omitted, but heretofore advanced. The Court has utilized this stipulation as a basis for establishing the questions to be decided.

ISSUES

1. Did the defendant-employer breach the Strike Settlement Agreements by failing to recall registered strikers to the jobs they held before the strike, unless the striker had been permanently replaced or unless the striker's job had been permanently abolished during the strike for legitimate economic reasons?
2. Did the defendant breach the Strike Settlement Agreements by filling jobs during the strike settlement period by transfer, promotion, and demotion rather than by recalling registered strikers?
3. Did the defendant breach the Strike Settlement Agreements by failing to recall strikers whose jobs at the end of the strike were occupied by (a) summer employees; (b) non-bargaining unit trainees, who had been transferred into the bargaining unit during the strike?
4. Whether the defendant in negotiations at the Governor's conference held in New York City on August 5, 1960, orally agreed (a) to offer union officers a job; (b) to continue the preferred hiring provision of the agreement for a period of six months; (c) offer unrecalled strikers jobs in occupational groups and seniority areas other than the occupational group and seniority area such strikers had occu-

pied before the strike, provided such strikers were qualified and no strikers from these groups and areas were awaiting recall; (d) to recall strikers whose former jobs were unavailable to "comparable jobs," and if so, to the extent it differs from the written agreement of August 11, 1960, is it binding upon the defendant?

5. Did the defendant breach the Strike Settlement Agreements by failing to maintain a preferred hiring list in a form similar to the layoff lists previously used in layoff situations or did it conceal such lists from the plaintiffs?

6. Did the defendant breach the Strike Settlement Agreements by failing to provide plaintiffs with information requested by plaintiffs during the settlement period or by failing to disclose to plaintiffs that it had periodic data processed list which it used in its personnel department?

7. Did the defendant breach the Strike Settlement Agreements by depressing the total bargaining unit during the life of the Strike Settlement Agreements through December 31, 1960 to avoid its contractual obligations?

DISCUSSION OF THE MERITS

Issues Conceded to be Excluded

It should be made clear at the outset, that the plaintiffs have made no claim, as to the ineligibility of any new employee (stranger) being hired between September 1, 1960 and December 31, 1960, aside from the conditional hires, because there was a qualified registered striker awaiting recall. (Tr. 2502-3, 2507, 2522, 976). Furthermore, there is no claim made by the plaintiffs in this action as to any discrimination occurring after January 1, 1961, pertaining to registered strikers on the preferred hiring list, who might claim they were discriminated against after that date; such issues, if they exist, are regarded to be solely within the jurisdiction of the NLRB. This is a contract action, wherein

the plaintiffs' claims are limited to the period of the Strike Settlement Agreement. (Tr. 2398-99, 4268).

JURISDICTION

This action is properly within the jurisdiction of the Court pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. The defendant concedes jurisdiction, but questions the advisability of having the same issues litigated simultaneously before the Court and the NLRB. (Tr. 996-98).

"The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise." *Smith v. Evening News Assn.*, 371 U.S. 195, 197-8 (1962).

See, *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964); *United Steelworkers v. American Internat'l. Aluminum Corp.*, 334 F.2d 147, 153 (5th Cir. 1964); *Textile Workers Union of America v. Arista Mills Co.*, 193 F.2d 529, 533-34 (4th Cir. 1951).

Labor issues may be both a public violation, subject to the scrutiny of the NLRB, and a private contract violation subject to the Court's jurisdiction. The plaintiff-unions, as the exclusive bargaining agent of the employees, have standing to litigate their employee's interests under the law.

Section 301 of the Labor Management Relations Act provides:

“(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

“(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.”

Agreements which are subject to § 301 must be construed, if possible, to effectuate national labor policy. Construction which would bring such an agreement into conflict with substantive labor law should be avoided.

“We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. See *Board of Commissioners v. United States*, 308 U.S. 343, 351 (84 L.Ed. 313, 317, 60 S.Ct. 285). Federal interpretation of the federal law will govern, not state law. Cf. *Jerome v. United States*, 318 U.S. 101, 104 (87 L.Ed. 640, 643, 63 S.Ct. 483). But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. See *Board of Commissioners v. United States*, *supra*, at 351-352. Any state law applied, however, will be ab-

sorbed as federal law and will not be an independent source of private rights.” *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-7 (1957).

See, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964); *Local 89, General Drivers v. Riss & Co.*, 372 U.S. 517, 519-20 (1963); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-80 (1956); 4 Williston on Contracts, §§ 615, 621 (3d ed. 1962).

BURDEN OF PROOF

Whether the burden of proof, in its primary sense, rests upon the plaintiffs or the defendant is ordinarily to be determined by ascertaining from the pleadings, which of the parties would be compelled to submit to an adverse judgment, before the introduction of any evidence. The burden of proof rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the action is concluded. *Reliance Life Co. v. Burgess*, 112 F.2d 234, 237-8 (8th Cir. 1940); *Lilienthal's Tobacco v. United States*, 97 U.S. 237 (1877); *Hotel Co. v. Wade*, 97 U.S. 13 (1877); *Davis v. O'Hara*, 266 U.S. 314 (1924); *Nikitiuk v. Pishtey*, 153 Conn. 545, 553 (1966); *Wetherell v. Hollister*, 73 Conn. 622, 626 (1901); *Silva v. Hartford*, 141 Conn. 126 (1954); 29 AM. JUR. 2d §§ 128-130.

The burden of proof in the secondary sense of going forward with the evidence rests upon the party, who at the particular state of the trial, is required to meet a prima facie case established by his adversary, once sufficient evidence has been offered to justify a finding. 29 AM. JUR. 2d §§ 127 (f14, § 132).

“(W)here . . . a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.” [Quoting 1 Greenl. Ev. § 79]

"This burden, however, which was simply to meet the prima facie case must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff." *United States v. Denver R.G. R.R.*, 191 U.S. 84, 92 (1903).

The principle of proof which requires the defendant to go forward with the evidence, when the plaintiff has presented a prima facie case and the explanatory information is peculiarly within the defendant's knowledge and control, is analogous to the legal concept regularly applied in NLRB enforcement proceedings. The latter proceedings generally treat the defendant's averments as an affirmative defense, wherein the burden of persuasion rests with the defendant.

"(O)nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

"To rely on the *Mackay* case it would have been necessary to convince the Board that the reason for (respondent's) refusal to rehire was that the jobs had been immediately filled." *Firth Carpet Co. v. NLRB*, 129 F.2d 633, 636 (2d Cir. 1942).

See, *Nabojs v. NLRB*, 323 F.2d 686, 690 (5th Cir. 1963); *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48, 56 (6th Cir. 1954); *New Orleans Roosevelt Corp.*, 132 N.L.R.B. 248, 250 (1961).

In the present civil action, the primary burden of proof has not changed; it rests with the plaintiffs to submit substantial evidence upon which the Court may base essential findings in their favor. However, where relevant and mate-

rial facts rest peculiarly within the defendant's knowledge, it will be incumbent upon it to come forward with the proof; and should it fail, an inference is raised that the evidence, if produced, would be unfavorable to its cause. The plaintiffs' basic burden of proof, their responsibility for the overall persuasion of the Court in establishing the factual truth of their allegations, still remains with them; and that burden requires that they prove all the essential material allegations of their case on each issue submitted, by a fair preponderance of the evidence.

CONDITIONAL HIRES

On August 9, 1960, the date the strike ended at Pratt & Whitney, there were 389 "new hires" and on August 8, 1960, 61 "new hires" at Hamilton, who had been hired as permanent replacements for strikers during the strike period but were scheduled to report for work on agreed dates subsequent to August 8, 1960. (PX-137, p.2; PX-138, p.2; Tr. 398-9).

The plaintiffs concede that they had been informed by the company, that the latter had made commitments to hire certain people during the strike period who would be reporting for work after the strike ended. However, the plaintiffs claim the defendant had in actual fact made no such contractual commitments. (Tr. 509-10, 2854). The plaintiffs admit that if a legally binding contract had been made, defendant would be justified in treating these jobs as unavailable to strikers at the end of the strike. (Tr. 511-13, 2856-57).

The plaintiffs' rationale is that these new employees had not been actually hired as of August 8, 1960, because they had not been effectively put on the payroll before the termination date of the strike. (Tr. 2713). They contend that they were in fact conditional hires, because they had not yet passed the required medical examination, a prerequisite to being put on the payroll. (Tr. 385-86). The plaintiffs ar-

ue that such a "new hire" in this category should be simply classed as an applicant who had been interviewed. (Tr. 701-3). Since the put-on date was ordinarily the date of actual hire (Tr. 2716), when the strike ended, the defendant should have considered all of these jobs, which had been promised to the conditional hires, to be immediately available to the strikers who had occupied them prior to the strike under Paragraph 4(a) of the Settlement Agreement. (Tr. 404-5). The plaintiffs' position is that the applicant ran the risk that the striker might return to work before he was put-on, or that the strike would end and the company's need for employees might be such that it would have no room for him. (Tr. 408). Plaintiffs' position is that notwithstanding the admitted fact, that the defendant did timely advise the plaintiffs during settlement negotiations of the status of these new hires and agree how they should be treated, since they were not in fact technically on the payroll as permanent replacements when the strike ended, it mattered not what the parties had understood or agreed.

The defendant employer had commenced hiring permanent replacements for strikers at both plants beginning shortly after July 7, 1960. (Tr. 492). It advised the plaintiffs at the Park Lane Hotel conference meeting on August 5, 1960, in New York City, that a considerable number of employees had already been hired at both plants, who would have to be put on the payroll, even if a settlement were immediately reached; that the hiring of permanent replacements was still continuing and commitments for permanent jobs were being made daily by the defendant. (Tr. 701-2, 764, 2074-5, 3506). The following day, August 6, 1960, the defendant again discussed with the plaintiffs' local officers and committee representatives the details of the proposed settlement, and explained to them that there were a number of new hires, who had not yet returned to work, who would be reporting in a week or two. A discussion of the subject arose again at the time of the execution of the Strike Settle-

ment Agreements with Pratt & Whitney Lodge #1746 on August 11, 1960 (Tr. 5474-77) and at the Hamilton Standard meeting on August 16, 1960, when the new collective bargaining labor agreement was signed. At the latter meeting, President Seedman inquired when the last strike period "new hire" would be reporting to work, and Vice-President Burke directed his personnel director Vandervoort to check the records and report the accurate count to the union president. This information was given to Seedman the same day, namely, that out of a total of 86 at Windsor Locks, all but seven had reported; and of the 47 at Broad Brook only three remained to report. (Tr. 3508). On the afternoon of that same day, with Lodge #1746, the same question was advanced pertaining to the number of new employees who had been hired at Pratt & Whitney, but had not yet reported to work. The defendant estimated between 300-350 (Tr. 5474-76).

The defendant-company's position is that once an applicant had accepted employment and had been assigned to a specific job in the bargaining unit, it could not legally or morally unilaterally withdraw from the employment agreement. (3831-2). Some of these "new hires" had deferred reporting to work, because they required time to work out notices with their then present employer, or make arrangements to move here from out of state. Still others of the 228 Pratt & Whitney "new hires" for whom there was a gap of two weeks or more between the date of their interview and the date they started work, may not have reported during August 1960, because of the two week partial shutdown in some sections of the plant. (Tr. 2853-54, 2861, 2891, 9443). The defendant conceded that employment practices provided that should any "new hire" fail to pass the physical examination required, he could not be put on the payroll. (Tr. 3828). The defendant's position is, however, that such a person had in fact already been hired and vested with a specific job and could only be divested of his job by reason

of a subsequently disclosed physical defect or some other subsequent information which might reveal him to be a security risk. While inquiries were made by the unions and discussions had between the parties relating to the number yet to report at a given time, no question was ever raised during the settlement period challenging the legal correctness of the defendant's procedures or its interpretation and administration of the Settlement Agreements on this issue. Not until after this suit was initiated more than a year later, did the unions, for the first time, suggest a legal distinction on this issue of the defendant's job commitment to these hires.

"(I)ntention can be determined from the language used and the circumstances known to both parties under which the negotiations were had. The contract must be read in the light of the whole relationship between the parties." *Hess v. Dumouchel Paper Co.*, 154 Conn. 343, 348 (1966).

The plaintiffs' position is unsupported by the facts and is without merit. The Court finds that the defendant had the intention and did in fact bind itself to a firm contract of employment, at the moment it agreed to employ the "new hires" and that the latter had each accepted a specific job assignment. The possibility that they might be subsequently divested of such jobs, because of medical or security reasons is too remote and speculative to change the contractual relationships.

"It is a well-settled rule that an employer may fill positions left vacant by employees going out on an economic strike, and that he is not later 'bound to displace men hired to take the strikers' places in order to provide positions for them.' *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); *Vogue Lingerie, Inc. v. N.L.R.B.*, 280 F.2d 224, 226-227 (3d Cir. 1960); see *Olin Mathieson Chemical*

Corp. v. N.L.R.B., 232 F.2d 158, 160-161 (4th Cir. 1956), *aff'd per curiam*, 352 U.S. 1020, 77 S.Ct. 587, 1 L.Ed. 2d 562 (1957); *N.L.R.B. v. Industrial Cotton Mills*, 208 F.2d 87, 91, 45 A.L.R. 2d 880 (4th Cir. 1953). Under these cases, the critical time seems to be when the arrangements with the replacement workers became irrevocable and fixed, a readily determinable fact. Applying this rule to the present case, if the company is found to have bound itself irrevocably by contracts of employment made with the replacement employees some time before they went to work then we think that the grievance is covered by the exclusion clause because the critical event, that of hiring, occurred within that period. On the other hand, if there was an informal arrangement in which the company told the men only that jobs would be available to them if they presented themselves at the plant, then there was not any hiring until the men began work. . . ." *International Ass'n of Machinists, Lodge 1652 v. International Aircraft Services, Inc.*, 302 F.2d 808, 812-813 (4th Cir. 1962).

Having been fully appraised of the defendant's firm commitment as permanent employees to this category of new hire, prior to the signing of the Settlement Agreements, the Court finds that the plaintiffs assented and agreed to these strike period "new hires," as employees in those jobs to which they had been specifically assigned, on or before the actual settlement dates, which were August 8, 1960, in the case of Hamilton, and on August 9, 1960, in the case of Pratt & Whitney. The plaintiff's belated attempt to claim that they were then unaware, on the date the Settlement Agreements were signed, that these hires had not been actually cleared by medical examination and thus that they were not hired under an irrevocable agreement, is ingenious but unpersuasive and untenable.

PERMANENT REPLACEMENT OF ECONOMIC STRIKERS

The plaintiff-unions have launched a scattergun type of attack on the defendant's claimed violations of the Strike Settlement Agreements; they claim that practically everything the defendant did in administering the Settlement Agreements was unlawful and carried out with evil motives. Where the settlement contracts afford the plaintiffs' membership greater rights than the national labor law, they tenaciously stress the terms of the settlement contract; but where the inverse position would seem to be more advantageous, they minimize the applicability of the contract terms and seek to apply principles and policies embodied in established precedents under the body of federal labor law. The great majority of policy-making decisions in this field of the law have generally emerged from a relationship, where there has been a complete absence of a specific strike settlement agreement. In those situations, courts have been called upon to hew and shape general labor law principles and supplemental corollaries, to safeguard the unwritten rights of the litigants.⁴ In this case, however, we are dealing with specific recall conditions which are contractual in nature and establish with considerable specificity the mutual obligations of the parties.

The plaintiffs represent that the company violated the Strike Settlement Agreements by treating those jobs occupied by new hires and transferees during the strike period, as if they were permanent replacements and thus made these jobs unavailable to the registered strikers when the strike ended. This position is founded upon the legal premise that the economic strikers, who have not been permanently replaced, retain their employee status, their seniority and right of reinstatement. Their status with respect to available jobs cannot be subordinated to that of other employees or otherwise discriminated against. See, *Olin*

⁴ See *Textile Workers v. Lincoln Mills*, *supra*, 353 U.S. at 456-57.

Mathieson Chem. Corp. v. NLRB, 232 F.2d 158, 169 (4 Cir. 1956), *aff'd per curiam*, 352 U.S. 1020; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 (1963); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

The plaintiffs reach out even further in their rationale and represent that those strikers whose pre-strike jobs were occupied at the end of the strike by permanent strike period hires and transfers were not in fact permanently replaced. (Brief for Plaintiffs at 271; Tr. 3817). This theory advances the claim, that the defendant made permanent hires and transfers during the strike as additions to the work complement, not as replacements. They contend that defendant's conduct in this regard was not made with a view toward post-strike conditions, but as a temporary makeshift arrangement to continue production during the strike. They argue that because the defendant did not specifically identify on its put-on records, which of the named strikers during the strike period each "new hire" actually replaced, (Tr. 3555) it thereby gave to these strike period "new hires" and transferees a priority over *all* registered strikers. To support this theory, the plaintiffs emphasize that when the defendant was asked during pre-trial discovery, to name which of the new hires had replaced specific named strikers, it responded that it did not know with complete certainty, which specific employee was absent in the capacity of a striker or whether the absence was for other personal reasons; including the absentee's hesitating to return because of fear of bodily harm. (Tr. 2272-75, 6191-92). In this respect, it may be judicially noted that the defendant recently prevailed in the Connecticut state trial court in separate suits (now on cross-appeals) arising out of the plaintiff-unions' acts of violent strike misconduct, which alleged the unlawful interference with the return to work of personnel, who might otherwise not have remained away from work. (Tr. 1938; DX-53, DX-54, DX-55, DX-56; note 3, *supra*).

However, the plaintiffs claim the defendant's answer to the plaintiffs' pre-trial interrogatory constituted an admission, that the "new hires" during the strike period were not in fact permanent replacements of strikers, because the defendant failed to state which strikers had been replaced (Tr. 1007-08, 1010). Thus, the factual issue is presented as to whether or not the striking employees had been permanently replaced.

"(E)conomic strikers are not employees if their jobs are filled by permanent replacements during the strike before they make unconditional requests for reinstatement. . . . (T)heir employee status is not changed if their jobs are still open or are only temporarily filled." Daykin, *The Distinction Between Economic and Unfair Labor Practice Strikes*, 12 Lab. L.J. 189, 193 (1961).

See, *Kansas Milling Co. v. NLRB*, 185 F.2d 413 (10th Cir. 1950); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208 (1958); *Cranston Print Works Co.*, 115 N.L.R.B. 537 (1956); *Chalet, Inc.*, 107 N.L.R.B. 109 (1953); *Wilson and Co.*, 105 N.L.R.B. 823 (1953).

"While the employer may know that hiring replacements tends to dissipate the effects of the strike, and thereby tends to discourage union activities, such conduct is regarded as a legitimate weapon of economic warfare. Reasonable 'discrimination' in the exercise of this right is justified by the employer's legitimate interest." *NLRB v. Potlatch Forests*, 189 F.2d 82, 86 (9th Cir. 1951).

See also, *Olin Mathieson Chem. Corp. v. NLRB*, *supra*.

When negotiations broke down between the parties on July 7, 1960, the defendant notified the plaintiffs' representatives personally and by newspaper advertising that it was embarking on a full scale hiring program and that those who were "newly hired" during the strike period would be

permanent replacements for strikers. (PX-176, p.2, PX-128, DX-75, p.4; Tr. 5486, 1090-91, 1709, 8814-15). The defendant also distributed to each striker a printed bulletin (PX-107; Tr. 1024) advising him that during an economic strike where an employee permanently replaces an employee-striker, neither the union nor the striker can require it to subsequently discharge the replacement. (Tr. 1021).

From July 7, 1960 continuously to the date of the signing of the Settlement Agreements, all of these new employees, as well as the unions' membership knew and fully understood that these "new hires" were employed in jobs which were no longer open and available to strikers who might wish to return after the strike. (Tr. 3922). In fact, as referred to above, the litigants actually discussed this very point prior to the consummation and execution of their Settlement Agreements and the unions were even advised of the defendant's best estimate of the approximate number of registered strikers who would have no jobs to which to return.

As these "new hires" were put on the payroll, the defendant did not identify on the record which specific individual and new hire replaced. (Tr. 3555). The defendant explained that considering the massive number of employees out on strike, it had no way of knowing which ones, if any, would eventually express a desire to be returned. (Tr. 6191-92). Plaintiffs' claim that this procedure permitted the company to replace all the strikers is completely without merit. Regardless of the company's personnel procedures, at the conclusion of the strike, those positions filled by replacements would be unavailable to returning strikers and those positions which remained unfilled and which had not been abolished were available to strikers.

The plaintiffs point to the pre-settlement discussions between management and the union representatives, as relating to the possible increase in openings which might accrue, due to the strike period's abnormal and unsettled hiring

conditions. Vice-President Burke expressed his best guess on the possible openings at Pratt & Whitney, based upon statistics derived from the strike experience of similar plants in the industry. (Tr. 9551-53). He estimated that 10% of the strikers probably would not apply for reinstatement; that about 800 strike period hires had been employed as permanent hires, but were recognized by management as being in the category of students, who would most likely return to school shortly after Labor Day; and from experience it could be expected, that there was always a larger percentage of turnovers in "new hires" employed under such abnormal and unsettled strike conditions in addition to a normal increased season turnover. (Tr. 6161).

While a speculative discussion of the factors which might cause potential turnover, with a resulting possible increase in job openings, might encourage an attitude of optimism and hope on the part of returning strikers, it is no justification to warrant a conclusion that the defendant knew with reasonable certainty the exact extent to which this might occur or that the defendant in making such an estimate was thereby making a firm commitment. It certainly warrants no factual finding, that such "new hires" were not permanent replacements. On the contrary, the evidence supports the unequivocal conclusion, that these "new hires" were not "additional hires" but rather they were put to work as permanent replacements for strikers, who had elected not to return to their jobs during the "strike period." (Tr. 3926-26). The parties to the Settlement Agreements were fully cognizant of all these circumstances. (Tr. 549-50, 3922). These "new hires" effectively replaced the strikers whose jobs they filled and the latter lost their right to reinstatement, except as provided under the terms of the settlement contract, or as otherwise provided by federal labor law.

"(I)t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left va-

cant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

...
 "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the ground of skill or ability. . . . It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait. . . ." *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-6, 347 (1938).

See also, *NLRB v. Plastilite Corp.*, *supra*; *NLRB v. Fleetwood Trailer Co.*, *supra*; *Vogue Lingerie, Inc. v. NLRB*, 280 F.2d 224 (3rd Cir. 1960); *Kansas Milling Co. v. NLRB*, *supra*; *Brown & Root, Inc.*, 132 N.L.R.B. 395; *Ohio Ferro Alloys Corp.*, 104 N.L.R.B. 542, 546 (1953).

Confirmation of this replacement procedure is further demonstrated by the mutual understanding of the plaintiffs and the defendant, that unemployment compensation Form UC-16A should be sent to the State Unemployment Office by the employer-defendant, with the notation "no job available." This filing qualified the recipient for compensation, yet it did not remove him from the defendant's official personnel or payroll records. (Tr. 5515, 5518; DX-47, PX-59).

"Upon being permanently replaced, a striker becomes entitled to unemployment compensation even though strike continues." *Ruberoid Co. v. California Unemployment Ins.*, 378 P.2d 102 (1963).

ABSENTEES—DEPARTMENT 500

The plaintiff-unions also complain that the defendant discriminated against registered strikers by treating inactive

absentees as if they had been active. They claim that in reserving jobs for such absentees, the defendant discriminated against registered strikers, since both categories of employees had been absent during the strike and should not have been treated differently on the basis of their reasons for absence. If the defendant was satisfied through acceptable objective proof that an employee's absence was the result of illness or that he failed to report, because of fear of bodily harm during the strike or as a result of an excusable personal reason, his job was regarded as available to him. Plaintiffs represent that this distinction in treating strikers differently from inactive absentees violated the Strike Settlement Agreements.

Those who were out ill or had been absent for five or more days for personal reasons, before the strike started, were transferred, as was the custom, into Department 500 for record purposes. It was used by the personnel department as a means of disclosing protracted or repetitive absences. They remained there until the defendant was otherwise subsequently advised as to their reasons for absence. One who returned after the strike started, who had been in Department 500 and represented he had been ill during the strike and had not registered as a striker, was treated by the defendant as if he had been ill and not on strike. Those in Department 500 continued to earn seniority for vacations, Christmas bonuses and insurance coverage. (Tr. 806-09).

The Court finds no violation of the Strike Settlement Agreements, on the part of defendant in returning those absentees to work as regular employees, upon receipt of satisfactory proof of valid personal reasons for continued absence during the strike, since such reason under ordinary and usual circumstances would have been acceptable as justifying absence before the strike occurred. Nothing had occurred between that category of employee and his employer to separate or change his status.

A more tenuous situation arises where the employee was not in Department 500 before the strike commenced, but remained absent from work because of conditions created by the strike and the fear of bodily harm; or because he became ill during the strike or had other valid personal or family reasons for absence. He then returned at the strike's termination, but did not register as a striker. For about one month after the strike commenced, the defendant attempted to record absentees on its daily reports, but found it to be unreliable and impractical. (Tr. 1257-58). No evidence was adduced to demonstrate any abuse of discretion or practice of discrimination by the defendant, in applying the rule that if satisfactory proof was presented as to illness or other valid reason, the continuity of employment would not be considered as being interrupted. The Court finds that there was no evidence that the defendant used this procedure as a discriminating practice to the detriment of any registered strikers.

DEPRESSED COMPLEMENT

Plaintiffs' Claims

The undergirding theme of the plaintiffs' case is that the defendant designed and conspired a master plan, at both of the defendant's production divisions involved in this litigation, to keep the complement depressed during the settlement agreement period as much as possible, consistent with its maintaining a level of deliveries adequate to pacify its customers and avert suspicion in order to deprive the union membership of the benefits of the Strike Settlement Agreements. They assert that the defendant's underlying motive was to reduce its labor costs following the strike by hiring lower labor grade employees after January 1, 1961, when its obligation to hire from the preferred hiring list had expired. (Tr. 4989-91).

The plaintiffs in substance represent that even should the Court find that the defendant did not violate the letter of

the written agreements, it violated its obligation of good faith and fair dealing which is implicit in such an agreement. The burden of proof on this issue as on all others in this civil action, rests with the plaintiffs. They must prove that the defendant acted in an arbitrary manner designed to avoid the obligations it had assumed under the Settlement Agreements. These contracts carried with them the obligation of mutual good faith and fair dealing in their execution; and national labor law policy infused an additional element, namely that strikers could not be discriminated against in the administration of the recall provisions in the agreements.

To support their claims the plaintiffs state that on August 15, 1960, Mr. Mallet, the Pratt & Whitney General Manager, issued instructions that all department managers should immediately review expenses and take all necessary steps to keep within forecast expenses as reflected in the budget and keep shipments at a maximum. (PX-255(a), p. 1, para. 2; PX-255(b), p.1, para. 3). Thereafter, at an operating committee meeting on September 19, 1960, Morse, the personnel manager, reported: "at the end of the strike 5,000 employees from East Hartford and Manchester plants were still out; of these 4,500 registered for re-employment, 3,000 are presently back to work, and it is expected that 300-400 will be recalled by the end of the year." This would leave 1,100-1,200 registered strikers who would not be recalled by the end of the year. (PX-255(b), p. 2, last para.). On August 19, 1960, Morse stated he was advised that the maintenance organization would do a minimum amount of work during the settlement period. (Tr. 5755-56, 5593-94, 5524, 6154) and that routine maintenance operations would be postponed. (Tr. 5593-4, 6165-68).

At Hamilton, plaintiffs offered testimony to the effect that the defendant abandoned its projected manpower needs (DX-66(b)) and relied upon subcontracting and overtime to compensate for the manpower lost during the strike. (PX-

256(a), p. 2). They claim that this is confirmed by the minutes of the operating committee meeting of August 23, 1960, which indicated that there were 1,750 production workers prior to the strike and the factory intended to hold employment at 1,600, and that this arrangement would require 20% overtime during 1960. (PX-256, p. 3, para. 2).

Plaintiffs contend that the depression in the complement in each division resulted from "policy decisions" formulated or finalized immediately after the Strike Settlement Agreements were signed and that it was successful in accomplishing its purpose. They claim that the plan not only precluded registered strikers from being recalled to their former jobs, but strikers with substantial seniority in consequence of the depression were restored to inferior jobs, where they blocked the reinstatement of other registered strikers. Plaintiffs advance the rationale that the defendant had enormous backlogs in both divisions at the end of 1960, which could have been reduced at least in part by restoring the complement. It is reasoned that the long-term benefit the defendant gained was the discouragement of strikers and union membership (PX-110, p. 1, last para.; PX-256(b), p. 3, para. 3; Tr. 1029-30), and its short term benefits included the replacement of skilled strikers receiving high labor grades with non-strikers and strikers hired in lower labor grades. (PX-154, PX-155, PX-306(a) and (b); Tr. 4044-47, 4358-61, 8346-47).

Plaintiffs further contend that the defendant adjusted its engine delivery schedule, so as to satisfy military deliveries, by scheduling fewer deliveries than it knew it could produce (PX-164), so as to reflect a bona fide appearance of extra effort in attempting to catch up on backlog. This whole scheme, according to the plaintiffs, was in furtherance of its plan to maintain a reduced work complement during the settlement period between September and December 1960. (PX-13(a), p. 24; DX-29).

Plaintiffs state that normally defendant used as little overtime as possible (Tr. 3516, 9535), but that both of defendant's divisions scheduled in advance and used "substantial amounts of overtime throughout the settlement period." (DX-64; PX-98(b), p. 2; PX-256(b), PX-131, PX-132, PX-133; Tr. 6736-37, 5174-76, 5077-78, 4596-97). At Hamilton, 265,000 manhours of direct labor had, as of August 23, 1960, been subcontracted to 22 firms. (PX-256(b), p. 3; PX-256(c), p.3). Defendant also employed "loan-outs" (PX-175, p. 8, para. 5-9) of which no record was kept (Tr. 3930-35, 9422-24, 4485-87, 6341-43; PX-8, p. 5; PX-21(2), pp. 83, 85, 87); and on occasion used non-bargaining unit personnel to do bargaining unit work. (Tr. 6217, 7057).

They allege the defendant's use of overtime was not unduly burdensome because under contract arrangements with the military, up to 75% of such additional cost would be borne by the Government. (PX-315, PX-316, PX-41, pp. 23-24; Tr. 9069-71, 9074-78). It is claimed that there was a direct correlation between the use of overtime and the depression of the complement in both divisions. In further support of this position, they point to the increase of average weekly overtime at Hamilton to 7.78 hours per hourly employee compared with an average of 5.25 hours during the preceding five-month period. (PX-62(c)). In similar vein, at Pratt & Whitney, plaintiffs claim that overtime was substituted for the restoration of the bargaining unit complement to its pre-strike size.

Still another device claimed to have been used by the defendant to achieve maximum productivity with a depressed complement was the use of wholesale transfers; thereby maximizing utilization of skills and adapting to whatever might be the production pressure point of the moment. (Tr. 3569-70, 4039, 4118-19, 4346). They argue that the volume of transfers during the settlement agreement period exceeded the volume of transfers during the actual strike, when the defendant made a substantial number of

transfers to balance the work force which had been depleted. (PX-37, p. 24, PX-287, PX-288).

Plaintiffs represent that the defendant's policy was to make use of available people within the plant (Tr. 4117-18), so that when jobs became "available," through turnover or increased work pressure, defendant filled the vacancies by the transfer of active employees to jobs, where they were needed most (Tr. 5193), wherever they could be spared from their current assignments (Tr. 4119, 4774, 4835); and that this policy was designed to avoid increasing the complement above the minimum required, not as defendant asserted to avoid lay-off of the surplus transferred employees. (Tr. 4039, 4118-19, 4338-42, 4774-78, 4781-84, 4835, 5021, 9202, 9488-90, 9502-03).

The employee status of all remaining eligible strikers was terminated after December 31, 1960 and plaintiffs claim as evidence of defendant's prior conduct in depressing the complement, that the latter then quickly took steps to restore the complements to normal size.

Hamilton wrote on January 5, 1961 to each employee who had been terminated from the preferred hiring list requesting him to file a new employment application, if he was interested in being considered for a job for which he might be qualified. On the following day, Hamilton advertised in area newspapers, indicating that it anticipated approximately 400 job openings. At the time this ad was placed, plaintiffs claim that there were approximately 844 available strikers at Hamilton, who had not been recalled and that many of them possessed skills which the defendant was seeking. Except for the letter of January 5th, the defendant made no attempt to ascertain how many of the registered strikers were qualified to fill these available jobs. (Tr. 753-63, 384, 577-79, 660-67, 672, 3945-46).

The plaintiffs have made no claim under the Settlement Contracts that these strikers had any contract rights subse-

quent to December 31, 1960 (Tr. 4268), and the Court will not consider the information relevant, except insofar as it sheds light upon the defendant's overall conduct and motives prior to January 1, 1961. As discussed above, any claims arising out of the defendant's alleged unlawful conduct during the period after January 1, 1961 are the subject of a pending claim alleging unfair labor practices now before the NLRB. (Tr. 2399).

General Administration of the Recall Agreements

Before discussing the merits of the defendant's alleged depression of the work complement, it would be helpful to discuss the general administration of the recall provisions of the Strike Settlement Agreements. In considering these provisions the parties have utilized the terms "Phase (1)," "Phase (2)" and "Phase (3)" to correspond to sections 4(a), 4(b) and 4(c) of the Settlement Agreements respectively. (Tr. 3994-97).

In phase (1) pursuant to paragraph 4(a) of the Recall Agreements, all registered strikers whose identical pre-strike job was available were immediately returned to the work complement. It should be noted that such strikers were not affected by seniority, except as it applied within the same job code. Thus a less senior registered striker within an occupational code and seniority area could be returned to work if his same pre-strike job was available in the same job code, department and shift. In practically all instances, phase (1) was completed in both divisions by September 5, 1960. (Tr. 3996).

Thereafter, at Pratt & Whitney, where no registered strikers had held the identical job on the same shift, the registered striker recall pursuant to paragraph 4(b) was the most senior unrecalled registered striker who held that same job on a different shift in the same occupational group and seniority area. (Tr. 3996).

Hamilton's paragraph 4(b) provided that where the striker's old job (shift, department and code) was not available, he would be given a "comparable or other available job in accordance with seniority and demonstrated ability." This language differed from paragraph 4(b) of the Pratt & Whitney agreement which made no reference to "comparable" jobs. However, its meaning was exactly the same in practical application as that in the Pratt & Whitney agreement, namely, that the most senior unrecalled registered striker would be given his old job on another shift, if it was available. (Tr. 9524-28). It does not mean, as the plaintiffs claim, that some other job at the same wage rate would be provided. If "pay scale" had been the measure intended, such descriptive language would most certainly have been used. When the parties negotiated the change in Hamilton's paragraph 4(b), they understood that under 4(b) a striker could only be recalled to his old job on a different shift. (Tr. 9524-28). Any other interpretation or application of the phrase would leave paragraph 4(c) of the Hamilton agreement both unnecessary and meaningless. This phase of the recall was completed for the most part, at both divisions, in early September 1959. (Tr. 3996-97).

When the initial restaffing at Pratt & Whitney had been completed pursuant to phases (1) and (2), the remaining registered strikers still unrecalled were transferred on defendant's records by means of a change of status slip to a nominal "Plant 90" (DX-44) solely for the purpose of personnel records' control. This transfer slip identified the department, shift, and job in which the striker had been before the strike, with the notation that the transfer had been made to the "Preferred Hiring List." (DX-46). This file was kept current by removing therefrom any terminations which occurred, because of resignation, death, retirement, discharge after arbitration, or failure to answer recall. It was used as the "preferred hiring list" and the source from which the company selected strikers for recall

as job openings developed at any time prior to January 1, 1961, before new employees were hired. The employee was thus recalled to a job opening from "Plant 90" into the seniority area and occupational code in which the job opening developed and where pre-strike labor grade was the same or less than the job to be filled. If the employee accepted the job and could qualify physically, he was then transferred from the record classification he held in "Plant 90" to the available active job complement. This file was sorted by seniority area, occupational code and individual seniority; and as strikers were recalled from "Plant 90" to active employment, their change of status slips were removed from the file, thereby reducing the current preferred hiring list containing the names of the registered strikers remaining to be considered for future job openings.

At Hamilton, the preferred hiring list was administered in much the same manner, except that unrecalled strikers at Windsor Locks who were on the preferred hiring list after the completion of phases (1) and (2) were transferred to a nominal "Department 800;" and those at Broad Brook to a nominal "Department 900" for record control purposes. The preferred hiring list file at Hamilton comprised the strikers' original registration cards, rather than the "change of status slips" as used at Pratt & Whitney.

At Pratt & Whitney, there were 4,515 strikers from the East Hartford plant who registered for reemployment and 20 from the Manchester plant. (DX-3, DX-3(A)). Of that number, 2,270 returned to work to the identical jobs in the same department, job code and shift which they held before the strike under phase (1) and 793 returned to other jobs under phase (2). (PX-2a lists 1 and 2 appended to answer to interrogatories Nos. 10 and 11). At the plaintiffs' request, written notice was given by the defendant to each registered striker that his name had been placed on the preferred hiring list and a Connecticut State Unemployment Notice, Form UC-16A accompanied it, so that the

striker would be eligible immediately to apply for and become entitled to receive state unemployment compensation benefits. (Tr. 5514-16).

During the entire period from the end of the strike through December 31, 1960, Pratt & Whitney recalled 3,470 strikers back to work,⁵ 407 of whom were recalled from the preferred hiring list⁶ pursuant to paragraph 4(c) of the Strike Settlement Agreement. Of the remaining 1,065 registered strikers⁷ who did not return to work by December 31, 1960, 196 resigned (DX-49(D)); three retired (DX-49(C)); and 24 were among the cases submitted to arbitration who were either dismissed pursuant to the arbitrator's decisions or resigned before their cases could be submitted to arbitration. (DX-49(E)). Those still remaining on the Pratt & Whitney preferred hiring list on December 31, 1960 totaled 842.⁸ Of these, 32 had been offered jobs, but failed to meet the physical requirements (DX-49(A)), 87 had been offered jobs which they refused to accept. (DX-49(F)). Of the 3,470 registered strikers who did return to work in the period through December 31, 1960, 2,744 returned to jobs in the same or at a better labor grade than they had when the strike started. (DX-3, DX-3(A)).

During the first three months of 1961, Pratt & Whitney wrote letters to 278 of the 842, who still remained on the preferred hiring list as of December 31, 1960 and advised

⁵ DX-3, DX-3A and DX-49(B). These show the registered strikers who return (i.e., 3,445 from DX-3, 17 from DX-3(A) and 8 from DX-49(B)).

⁶ This number 407 is derived by subtracting from the 347 who returned during the period, the 3,063 who returned in the initial restaffing of the plants.

⁷ Derived by subtracting 3,470 who did return from the 4,535 who registered.

⁸ Figure derived by subtracting from 1,065 the 223 who resigned, retired or were dismissed through arbitration.

them of an opening in their former field of work for which they might qualify and invited them to report to the East Hartford employment office within five days, if they were interested in discussing the opportunity. (PX-115(A), PX-115(B)). The remaining strikers were also sent a letter, between January 1, 1961 and March 7, 1961 and advised then that if they were interested in employment at Pratt & Whitney, the company would be happy to consider them as a new applicant for employment on jobs for which they were qualified; that if the company did not hear from them within five days, it would assume that they were not interested. (PX-116(A), PX-116(B)).

Six hundred and five strikers responded to these two letters and Pratt & Whitney hired 277 of them during the first three months of 1961; 132 in January, 87 in February and 58 in March. When considering these statistics it should be borne in mind, that during the first four months of 1961, Pratt & Whitney hired 1,593 additional new employees from among 17,000 applicants for employment during that period. (Tr. 5606-07).

At Hamilton, there were 2,021 registered strikers, 1,721 of whom were employed prior to the strike at Windsor Locks and 300 at Broad Brook. (DX-26(A), DX-27(A)). Of these, 689 strikers at Windsor Locks and 64 at Broad Brook * returned to the identical job in the same department, job code and shift, which they had held immediately prior to the strike; and in phase (2), 99 strikers at Windsor Locks and 5 at Broad Brook returned to their old jobs on a different shift.

During the entire settlement period through December 31, 1960, Hamilton recalled a total of 972 at the Windsor Locks plant and 108 at the Broad Brook plant. (DX-26(A), DX-27(A)). Of these, 184 at the Windsor Locks plant and

* PX-11(E) shows those not returned to identical pre-strike jobs (1,032 at Windsor Locks and 236 at Broad Brook). Deducting these from the known registered gives this result.

39 at the Broad Brook plant were recalled from the preferred hiring list pursuant to paragraph 4(c) of the Hamilton settlement agreement.¹⁰

Of the 749 Windsor Locks registered strikers and the 192 from Broad Brook (a total of 941) who did not return by December 31, 1960, 92 resigned, (84 from Windsor Locks and 8 from Broad Brook); 5 died (all 5 from Windsor Locks) and 1 from Windsor Locks was dismissed pursuant to the arbitration decision.¹¹ Also among the unrecalled strikers at Hamilton were 4 (3 from Windsor Locks and 1 from Broad Brook) who had already been offered jobs which they refused. (DX-26(B), DX-27(B)).

On or about January 5, 1961, Hamilton wrote to the approximately 843 strikers who remained on the preferred hiring list on December 31, 1960 and advised them of the termination of their preferred hiring status as of January 1, 1961. It invited them to file an up-to-date application at the employment office within five days and absent such application the company would assume they were no longer interested in employment. (PX-114).

Among the 659 strikers at Windsor Locks and the 184 from Broad Brook who remained on the preferred hiring list on December 31, 1960, about 476 from Windsor Locks and about 109 from Broad Brook filed applications for employment in the first four months of 1961. Of the 476 who applied at Windsor Locks, 142 were hired; and of the 109 from Broad Brook who applied, 35 were hired in that same period.¹² From May 1, 1961 through December 31, 1964, Hamilton hired 44 additional registered strikers, 8 who

¹⁰ 788 returned to Windsor Locks under phases 1 and 2 and 69 at Broad Brook; deducting these from the total number returned by 12/31/60 (972 at Windsor Locks and 108 at Broad Brook) results in figures used.

¹¹ 98 Strikers are listed in DX-26(B) and DX-27(B).

¹² DX-1, DX-2. During this four month period Hamilton also hired 382 new employees from among several thousand applicants.

worked at Broad Brook and 36 from Windsor Locks. (DX-33). Defendant's position is that after January 1, 1961, its policy was one of non-discrimination between strikers and outsiders. All employees hired after said date were hired as new employees without regard to seniority. (Tr. 3037-38, 3498-99, 1130-36, 4020-25, 6460-64).

*Discussion on the Merits—
Alleged Depression of the Complement*

In evaluating the plaintiffs' claims that the defendant designed a master plan calculated to depress the complements of hourly workers, and thus conspired to defeat the letter and spirit of the Strike Settlement Agreements, a peripheral comparison of the available statistical data alone can be most misleading. (Tr. 7489). When the Settlement Agreements went into operation, it must be remembered that the strikers who absented themselves from their work, did so without any regard to a balanced pattern in any phase of the manufacturing processes. During the strike the defendant felt obligated to provide work for all employees who remained on the job, as well as for those who voluntarily returned to work. Thus during the strike period, the imbalance in manufacturing parts increased each day operations continued. This condition was further accentuated by the fact, that many of the strikers who did voluntarily return during the strike, refused to accept work assignments ordinarily done by co-workers who still remained out.

It is apparent that the contractual obligations of each litigant is approached from opposite economic extremes. The unions' position fiercely attacks the company's alleged bad faith in not taking back all the strikers immediately or at least by September 5, 1960. It claims the inventory pipe lines of parts should have been adjusted by that time to accomplish an orderly assembly line; and if this was economically possible the company had an obligation to immediately return all registered strikers.

However, the business management and planning for a major industrial complex such as the defendant-company, is necessarily motivated by profit if it is to survive and prosper in the American competitive economy. Executives must exercise efficient business vigilance at all times in managing and carrying out the company's contractual obligations, if it is to accomplish profitable production; this is a legitimate and essential element in a capitalistic economy. The rehiring of registered strikers under the Strike Settlement Agreements was subject to the implied conditions, that those on the preferred hiring list would be recalled to available jobs, when openings occurred where their services could be utilized in economically productive work, before new employees were hired. In making these decisions of course, it was a condition precedent that the defendant would at all times act in good faith in making and carrying out its managerial decisions. However, there was no point in its having employees available who could perform operation #90 on a part, where operation #30 had not yet been completed and one procedure preceded the other by several weeks.

At Hamilton, the defendant anticipating the man-hours of manufacturing, which might be lost because of a strike, deliberately built up a pre-strike inventory backlog by increasing purchases 10-15%. (Tr. 5216); in addition it identified certain products and critical parts which required extensive lead time for their manufacture and took active steps to procure them by sub-contracting about 265,000 man-hours of production to twenty-two outside firms. To do this and still maintain a uniform quality control to insure an assembly line of readily adaptable finished parts, the company loaned out to sub-contractors many of its own jigs, dies and machine set-ups from its own lathes and production equipment.

When the strike ended, all pending contracts could not be arbitrarily cancelled and withdrawn without the defend-

ant being liable for damages. In those instances where batches of parts had been only partially processed, the defendant could not accept them in their semi-manufactured state, without releasing the sub-contractor from responsibility for faulty manufacture or parts failure. While this unbalanced production was flowing into the company's inventory pipe lines from sub-contractors, it could not economically duplicate this production in its own plant, nor did it possess the machines and fixtures to manufacture many of the items where the machine setups had been loaned out.

It was the opinion of Hamilton's operational manager, Gravelin, that the imbalance created by the strike created production problems lasting from 12 to 15 months. (Tr. 5076, 5169). He explained that the defendant could not afford calendar time to make pieces by economic lots and in order to combat the problem of imbalance, management would tear down the normal tooling on a machine, put a new set-up in to make several of the urgently needed pieces and thus release a production bottleneck. (Tr. 5078, 5175-76). The defendant requested employees who were operating critical pieces of equipment to work overtime, in order to get the maximum hours of continuous operation. (Tr. 5078, 5166). During the same period, several new products were causing manufacturing problems. This adjustment period was like fighting fires (bottlenecks) in various areas throughout the plant. (Tr. 5081, 5084, 5167). New equipment was progressively being installed. At Hamilton's Broad Brook electronic assembly plant, this included visual assembly techniques (repeating pictures synchronized with voice instructions) which increased production with a less number of employees. (Tr. 5082). Gravelin denied that there ever existed any policy, plan or practice during the settlement period to depress the employee complement so as not to return strikers. (Tr. 5084-85, 5178, 5197-98, 5212), and that had such a policy existed, he would have been aware of it. (Tr. 5213-14).

Delivery schedules at Hamilton were usually prefixed; delivery was not ordinarily as soon as possible. Production was regulated to meet a schedule and the available machines cycled to procure the parts needed within the scheduled time calendar. (Tr. 5094-95). The manpower complement cannot be relevantly compared to expected deliveries in any given month. The cost of material, engineering and parts production could represent several months effort and expenditures, yet the end product might be assembled and shipped in a matter of hours. Thus sales of very great dollar value might be shipped in any limited period and the labor cost within that period would be minimal. The lead time accumulation of value, when converted to sales dollar at a given moment cannot validly be compared with the required complement of employees, (Tr. 5108) except where the analysis is projected over several months. This principle also applies to the backlog schedule of orders. (Tr. 5143). The day the sale is made the whole dollar value becomes backlog, yet procurement of metals, engineering, tooling and parts productions may be scheduled several months or even years ahead.

Workload is measured by how long it takes to convert a raw piece of material to a finished one. Workload is a consequence of backlog plus lead time (Tr. 5119); and this is controlled by the amount of time assigned to engineering design, development, tooling and delivery schedules according to customer units required in a period of time. (Tr. 5120). During this settlement period new products accounted for between 30% and 50% of the total volume production (Tr. 5121); in addition there was an experimental department which made prototype pieces for engineering and production evaluation. It was extremely rare, upon receipt of an order to go into full scale production at that time.

Defendant's Exhibit 29 shows that beginning in January 1958 through April 1959 there had been substantial

reduction in the employee population. Sales backlog from January 1958 followed this trend through April 1959. (Tr. 5138). In those instances, sales at Hamilton in the form of actual shipments exceeded sales made in the form of contract orders received. From January 1960 through May 1960, the backlog increased, but population remained constant. (Tr. 5141-42).

The defendant represented that it never knowingly planned for a percentage of overtime as a substitution for the addition of manpower that had a foreseeable demand. (Tr. 5144). If the workload increased, because of a shortage of manpower or machines, defendant served the immediate need with overtime and then determined whether the need was permanent; if so, additional people were hired. (Tr. 5145).

This is no correlation between overtime and shipments, because the impact of overtime could be felt in shipments weeks and months ahead. (Tr. 5149-50). Where overtime is spent in assembly and tests or shipping, the effects are usually felt in days; while the same employee, working back in the line might have only a small impact many weeks away.

William E. Diefenderfer was the assistant general manager at Hamilton during 1960; he later became president of the division and is now a vice-president of United Aircraft Corporation. He represented that the strike caused very severe problems and the most severe among them was a parts imbalance situation, where it took time to get things organized before defendant could get back to normalcy. (Tr. 4505). He testified it took longer than 4½ months to get straightened out. (Tr. 4616). "To have simply hired more people would have made our problem worse. We were having trouble managing what we had." (Tr. 4620).

At that time Hamilton was just getting into the production of fuel controls for the General Electric P-585 tur-

bine engine and was having difficulty with one used on the Boeing 727, Hamilton's JFC-60. A new fuel system contract for a Pratt & Whitney engine was also underway and in early 1961 Hamilton was under extreme pressure to get this moving. The problems attendant upon these changes lead to overtime work. (Tr. 4507-08). At the time about 70-75% of the production was for the Government and the remainder for private commercial users. Navy representatives were on duty at the plant at all times, to verify that the equipment being manufactured was in accordance with contract specifications, that deliveries were on time, the pricing audited and the physical product inspected to assure its conformation with engineering drawings and quality. (Tr. 4510-11).

On January 6, 1961, a Hamilton press release indicated that 400 job openings were expected to occur within the next eight weeks and attributed this, to the reinstatement of contracts relating to the North American B-70 bomber, plus stepped up customer requests for other company products. (PX-23, A-L, Tr. 4512). The openings were mostly for skilled machinists and technicians, because there were limited production programs which were just getting under way. (Tr. 4514). In addition, a contract for Hamilton fuel controls for the P&W jet engines powering the Boeing 727 jet transport was obtained after competition with other companies. (Tr. 4515-16).

The preliminary production of a fuel control unit for a new adaption required engineering changes. It required a lot of special skilled work to be done before it could be adapted to mass production tooling. These fuel control units varied from 28 to 100 pounds and contained approximately one thousand precision parts; the price range varied from \$4,000 to \$80,000 per unit. It was a very precise and sensitive computer designed to read factors relating to engine speed, compressor pressure, exhaust temperature and inlet temperature, so as to compute exactly the

fuel requisite of the engine at a given instance and see that it was provided. (Tr. 4519-20).

Another relevant factor in the overall circumstances was that the company had changed the centers and groupings of machines during the strike at Hamilton, so as to provide a more efficient realignment of its production facilities. Manager Diefenderfer stated that there was never any policy of the company to deny strikers the opportunity to get back to work at any time; and he observed no practice which could be so interpreted. (Tr. 4523).

Diefenderfer's testimony tended to confirm that of Gravelin's; that while there were additional reasons, certain new items created a marked demand in the latter part of December 1960 and early January 1961, namely, the controls for the JT8D, the 727 control, the JFC-26, General Electric engine and prop for the J-58 (4568). Another business factor was that during the settlement period from September 1960 through December 1960, Hamilton was shipping out work at a rate greater than it was able to make sales (Tr. 4568) so that backlog was generally decreasing. However, this phenomenon alone was not the sole determination of the number of employees required. (Tr. 4580).

Diefenderfer represented that the reason why everyone could not come back was because of the disruption of the shop. Some parts were in short supply, others were adequate; outside sub-contracts offset some deficiencies. The myriad of complex interrelated parts were running ahead of the abilities of the production control system which was designed to bring order. (Tr. 4583). There was never any conscious design or motive on the part of Hamilton management to depress the complement until after January 1, 1961, when the preferred hiring list expired by contract. (Tr. 4584). In fact overtime was materially higher in 1961 than it was in 1960. (Tr. 4585). He pointed out that overtime in December 1961, a comparative monthly period, was

considerably higher than the same period in 1960 which is now the subject of controversy.

Overtime is generally used when the same team of experienced personnel are working on a problem part and where lesser experience with it would not suffice; or if the need is short-lived, it is better to keep people on than to hire and fire. He denied ever being present at any discussion of management during executive meetings, concerning any policy to depress the complement until after December 31, 1960. (Tr. 4587). Neither was there any discussion about delaying the hiring so as to avoid recalling people who were poor workers or who were distasteful or troublesome. He explained that short term overtime, accomplished in terms of weeks or months, is governed by the experience of the employees required, the availability of tooling, and special skills (Tr. 4598). He claimed it was better to work with a smaller force and try to get things turned around and make some progress in straightening the company out in order to satisfy customer needs; this was the only objective he claims he had at the time. (Tr. 4599-4600). He explained that the defendant was "trying to get a few pieces through to get this massive affair of ours, with these tens of thousands of parts, going again and literally, the more we got into it, it was more like pushing into a ball of cotton-wool." (Tr. 4601).

During the period September through December at Hamilton, shipments were going out faster than new orders were coming in and backlog was progressively decreasing. That in itself would be a restraining influence on new hiring. (Tr. 4607). The control for the JT8D engine and the three complex controls for the J-58 engine were items that required a great many skilled people. This was the basis together with other projects coming along, that caused them to get specially skilled people into that area. (Tr. 4608-9, 4614-5).

At Pratt & Whitney, in August of 1960, Smith, the assistant general manager, had worked out an agreement with the Government on the number of engines scheduled for delivery during the remainder of 1960. (PX-164, DX-64). This schedule also included scheduled deliveries for commercial customers. The earlier February (DX-62) and May (DX-63) schedules had been based on the presumption that no strike would occur; the August 16, 1960 revision recognized the strike problems. (Tr. 6646-47). The engines scheduled were of varying types and priced between \$150,000 and \$200,000 each. (Tr. 6655).

Scheduled Deliveries (August 16, 1960)		Actual Deliveries	
August	- 78	August	- 84
September	- 142	September	- 149
October	- 190	October	- 176
November	- 207	November	- 182
December	- 204	December	- 195 (Tr. 6649).

Smith explained that during the strike, defendant exerted special effort to get out as much of the product that was near the end of the production line as possible in order to maintain a maximum number of engine deliveries as long as possible. To accomplish this, parts and material in process were pulled out of the production line to meet use demands and this activity dried up operations at the beginning or middle of the production line sequence. The ability to recover was paced by defendant's ability to re-establish a normal flow of material. (Tr. 6650).

During the last four months of 1960 because of material shortages, considerable overtime was worked in the assembly and test department. Smith asserted that to bring back more people would not have increased production of the end product (engines) as would working with the available

material and machines seven days per week, 24 hours per day. (Tr. 6651, 6664). At least 90% of the overtime was on Saturday and Sunday. Smith explained that if you tried to bring in people for only two days a week instead of using the regular shift personnel, they would not have had the necessary skills. (Tr. 6653).

The lead time on some parts is seven or eight months. There were some places in the production line where parts inventory was exhausted, because material was drawn out to further operations during the strike. (Tr. 6654-55). While 821 engines were scheduled for delivery by the defendant between August 1960 and December 31, 1960, 786 were delivered, which was 35 less than defendant had planned. Smith stated that considering the fact that each unit sold for approximately \$175,000, the defendant most certainly would have delivered these 35 engines if it possibly could have. (Tr. 6656). During this period, the defendant started actual production of the fan-type engine for both military and commercial usage. This was a new model and although engineering had started on it in 1957, it bogged down because of unexpected production difficulties. (Tr. 6657, 6658, 6661-63). Smith claimed defendant did everything it thought was possible to meet its schedules. (Tr. 6676). He knew of no plan or policy to avoid taking back strikers. (Tr. 6677). The 6.1% overtime premium in October 1959 was higher than the 5.8% premium in October 1960, during the controversial settlement period. November 1959 shows 6.9%, November 1960 was 8.7%. The December figure was 6% and the December figure was 6.6%. (PX-229, PX-302; Tr. 8445, 8451). The fourth quarter of 1959 indicates an overtime premium of 6.3% as against the comparable quarter of 1960 of 7%; a difference of only seven tenths of one per cent. (Tr. 8449, 8452). An analysis of the total labor cumulative ratio of variances for the fourth quarter of 1959 was 54.5 as against 53.0 for the same period in 1960. (Tr. 8452). When plaintiffs'

counsel was inquired of by the Court concerning this statistical similarity he could point with no persuasive significance to this data. (Tr. 8454).

The plaintiffs do not compare total overtime in each year per se, but rather the ratio of the standard hours worked to the overtime worked for the entire year, namely 5.20-1 for 1960 and 6.48-1 for 1961. However, such a presentation then brings into issue a comparison of the size of the total working complement for the periods which are compared, together with a multitude of other related factors.

The plaintiffs point to the minutes of the operating committees' meetings on August 15, 1960, and September 19, 1960, as proving the defendant's planned intention to depress the work complement. (PX-225(a), p.1, para. 2; PX-255(b), p.1, para. 3; PX-256(b), p.3, paras. 2 and 3). In weighing the significance and overall relevancy of these summary reports, it must be borne in mind that a nine week strike had just concluded, which involved a substantial number of employees. The defendant claimed to have lost \$15,000,000 as a direct result of this economic upheaval. (Tr. 9587). The management of this corporation was responsible to the absentee owners (the stockholders) to earn a maximum net profit during the fiscal year. Admonitions by management to keep within the operating budget and review expenses, while at the same time maintaining maximum shipments throughout the remainder of the year is not inconsistent with necessary management planning required of successful business executives, to produce corporate profits.

“(S)ince fewer employees were needed to operate the plant(s), the respondent had the right to exercise a choice between efficiency and inefficiency.” *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 405, 409, (5th Cir. 1938).

While plaintiffs might argue that the defendant's primary, if not sole motivation should have been the prompt restoration to the payroll of all possible registered strikers by September 1, 1960, it must be realistically recognized that this was not the measure of its duty; the defendant was only required to exercise good faith in its management decisions relating to the restoration of the bargaining unit. Personnel Manager Mooney represented that Vice-President Burke's instructions to both divisions was to get operations back to normal as quickly as possible. (Tr. 3141-42, 9532-35). The defendant did not even promise to restore all registered strikers prior to January 1, 1961. On the contrary, it was mutually contemplated that all registered strikers would not be restored, because the agreement established the cut off date of December 31, 1960, for those entitled to receive vacation pay; and it established that date as a limitation on contractual preferential hiring rights.

In order to more realistically portray the defendant-company's recall problem in the post strike period, a comparative statistical analysis by division and section is superior to utilizing the plant wide figures. The following table sets forth the pre-strike complement on June 7, 1960; the complement on August 8, 1960 at the end of the strike; and a computation of the possible job openings against the number of registered strikers seeking a return to their former jobs. It will also show the job population trends through December 31, 1960 and thence to May 1, 1961. (DX-49, DX-3).

	6/7/60	8/8/60	Possible job openings at strike's end	Registered strikers seeking jobs	1/1/61	5/1/61
<i>Machine Shop</i>						
Made and worked parts for engines	4820	4668	152	1296	4909	5580
<i>Materials</i>						
New materials or parts received and final products shipped	1451	1251	200	308	1272	1313
<i>Master Mechanics</i>						
Made and/or repaired and maintained tools and machines used in manufacturing	1298	891	407	417	1200	1224
<i>Plant Engineering</i>						
Maintained, cleaned and repaired plant and supplied heat	1452	1242	210	391	1303	1389
<i>Assembly & Test</i>						
Assembled and tested engines	1281	873	408	434	1032	1155
<i>Semi-Production</i>						
Specialized products	1098	861	237	387	924	986
<i>Miscellaneous</i>						
Tool cribs	359	323	36	87	329	350
	<u>11759</u>	<u>10109</u>	<u>1650</u>	<u>3320</u>	<u>10969</u>	<u>11997</u>

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These statistics disclose that at Pratt & Whitney there were twice the number of registered strikers seeking recall, as there were possible job openings at the end of the strike. When one looks at the Machine Shop, it becomes glaringly apparent that there were 1,296 registered strikers applying for 152 potential job openings. Notwithstanding this unbalanced ratio of limited job openings at the strike's termination, the defendant did return 1,115 to work in the Machine Shop prior to January 1, 1961 under the terms of the Recall Agreement; 858 returned to their pre-strike jobs and 257 to other jobs. (PX-49, DX-3). Further emphasis on these disjointed imbalances is indicated when one analyzes departments within these sections, such as in Plant Engineering, where there were 33 employees working in Department 21 (Painters) when the strike began, there were the same number when the strike ended, yet there were 8 registered strikers awaiting recall.

In Assmby and Test only 223 of the 434 registered strikers were returned to work before December 31, 1960, a situation strongly emphasized by plaintiffs. It is of significance to note, that it was in this section that the complement had been overpopulated just prior to the commencement of the strike and there had been two layoffs in May 1960 in excess of 10%. The company had contemplated there would be further reductions in this section. (Tr. 6333). The recall of the lesser number into this section was also due to the unavailability of parts and complete engine assemblies which otherwise might have warranted increased personnel. (Tr. 6649-58). Defendant's Exhibit 49 discloses that there were 1,281 employees in Assembly & Test when the strike began, 1,032 at the end of 1960, and 1,155 by May 1, 1961. Defendant's Exhibit 3 discloses that 60 strikers and one non-striker were hired in January 1961; 14 strikers and 25 non-strikers in February 1961; 6 strikers and 28 non-strikers in March 1961, and 13 non-strikers in April 1961. It does not seem reasonable to infer, as the plaintiffs

would have the Court do, that the defendant would re-hire 1,274 strikers in its Machine Shop and Quality Control (final inspection (Tr. 6336), so as to effect a restoration of its ability to produce its end product and at the same time deliberately discriminate against Assembly and Test by refraining from recall 211 strikers in that division, thus diminishing its ability to ship completed engines and receive the profit benefits of its overall production efforts.

A similar analysis will disclose in a summary manner the job population trends in relevant divisions at Hamilton's Windsor Locks plant from June 7, 1960 through May 1, 1961. (DX-2):

Manufacturing Division

	<u>6/7/60</u>	<u>8/10/60</u>	<u>10/1/60</u>	<u>1/1/61</u>	<u>5/1/61</u>
Propellers, etc.	1518	1016	1265	1232	1230
Fuel controls	698	479	645	659	976
Overhaul & repair	512	314	329	317	313
Electronic beam (new division)	4	8	9	15	22
Ground support	18	19	26	31	49
Sheet metal fabrication	136	80	144	148	152
	<u>2886</u>	<u>1916</u>	<u>2418</u>	<u>2402</u>	<u>2742</u>

There was only one significant sub-division increase which occurred subsequent to December 31, 1960. This increase in the Fuel Controls sub-division between January 1, 1961 and May 1, 1961 was the result of Hamilton's receipt of a pilot order December 21, 1960 (dated December 16, 1960) requesting fuel control units for the Boeing 747 jets. While

the original order involved only eight fuel controls, this was the forerunner of anticipated orders. (Tr. 4515-21).

Experimental Division

	<u>6/7/60</u>	<u>8/10/60</u>	<u>10/1/60</u>	<u>1/1/61</u>	<u>5/1/61</u>
Experimental mfg. (propellers)	154	94	149	150	167
Experimental mfg. (fuel control)	228	138	202	196	198
Experimental test	227	185	205	198	212
Vibration & measurement	44	22	35	36	36
Materials	43	45	43	43	42
Engineering	—	—	—	—	—
	<u>696</u>	<u>484</u>	<u>634</u>	<u>623</u>	<u>655</u>

This table indicates that the employee population remained relatively constant from October 1, 1960 to May 1, 1961.

Hamilton's Broad Brook plant during the pre-strike period in 1960, had approximately 405 employees in the complement. Of this number, about 37 were in areas related to the support of the manufacturing operations and 33 in the machinery department. The remaining personnel were engaged directly in the assembly of items for production. The table following summarizes the job population trends from June 7, 1960 to May 1, 1961. It also demonstrates the problems faced at the conclusion of the strike with a far greater number of registered strikers (R/S) than possible job openings (P/J/O). (DX-26A).

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	<u>6/7/60</u>	<u>8/10/60</u>	<u>P/J/O</u>	<u>R/S</u>	<u>1/1/61</u>	<u>5/1/61</u>
<i>Support</i>						
Receiving & stores	4	3	1	3	3	3
Finished stores & dispatching	5	4	1	3	3	6
Shipping	4	4	0	0	3	5
Plant maintenance	17	15	2	6	17	15
Electrical maintenance	3	3	0	2	2	2
Power house	4	4	0	0	4	4
	<u>37</u>	<u>33</u>	<u>4</u>	<u>14</u>	<u>32</u>	<u>35</u>
<i>Assembly</i>						
Inspection	41	32	9	36	34	31
Assembly & test	206	139	67	168	167	222
Master crib	4	3	1	4	3	3
Electronic experimental	31	12	19	20	12	13
Electronic fabrication	7	5	2	3	7	7
Electronic laboratory	37	31	6	15	38	39
Electronic test	9	0	9	9	0	0
	<u>335</u>	<u>222</u>	<u>113</u>	<u>255</u>	<u>261</u>	<u>315</u>
Machinery	33	3	30	31	15	18

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The Strike Settlement Agreements carried with them an implied obligation of mutual good faith and fair dealing in their execution; and labor law policy infused an additional element, namely, that strikers could not be discriminated against in the administration of the recall provisions of the contract. The implied promise in this instance also carried with it the defendant's exercise of good faith in the continuance of its business "in the usual manner," insofar as economic circumstances would permit.

"The collective bargaining agreements states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-9 (1960).

See, *Local 961, Teamsters v. W. J. Digby, Inc.*, 341 F.2d 1016, 1019 (10th Cir. 1965); Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958).

Threaded throughout the relationship of the parties during the settlement period is the clear indication that a considerable degree of mutual trust and cooperation remained between the company and the union at the higher professional levels. Union General Counsel Papps wrote to President Hayes of the International Union as late as October 28, 1960, recommending that the remaining 32 cases of the original 50 submitted to arbitration, should be withdrawn from the judicial arbitration panel. He expressed the belief that the union members who had been charged with strike misconduct would fair better from

a decision by the company officials, Mooney and Burke, than they would with the panel of State Supreme Court judges. (DX-17, Tr. 9005). A similar attitude of trust was expressed in Burke's testimony, when he stated that on two occasions he had made an offer to President Hayes, that the latter retain a New York accounting firm to review the defendant's personnel records, and if it were found that the company had discriminated against anybody, it would reimburse them for full back pay. Hayes declined and stated that he would take Burke's word for it. (Tr. 9596-99).

The Court finds after considering the totality of the circumstances, that the plaintiffs have failed to prove their allegations that the defendant, or either of its subsidiaries, deliberately and in bad faith depressed the bargaining unit during the life of the Settlement Agreements through December 31, 1960 or that it failed to exercise good faith in the performance of the Strike Agreements to avoid its contractual obligations. While the plaintiffs placed this question in issue by a prima facie showing, the defendant assumed its burden of going forward and advanced proof¹³ which satisfied the Court, that it had acted in good faith and was motivated by legitimate and substantial business justification in the performance of its obligations under the Strike Settlement Agreements.

"Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show 'legitimate and substantial business

¹³ See e.g., DX-2; DX-2(A); DX-2(B-1-3); DX-2(C-1-3); DX-2(D-1-5); DX-2(E-1-3); DX-3; DX-3(A); DX-3(B-1-9); DX-3(C-1-7); DX-3(D-1-24); DX-3(E-1-3); DX-3(F); DX-26(A); DX-26(B); DX-27(A); DX-27(B); DX-49; DX-49(A-F).

justifications.' " *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967).

"(T)he employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. . . . As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963).

Also see, *Quality Castings Co. v. NLRB*, 325 F.2d 36, 40 (6th Cir. 1963).

TRANSFERS, PROMOTIONS & DEMOTIONS

Plaintiffs' claims on this issue were multiple and diverse: (1) those promoted or transferred during the strike were not permanent replacements for strikers, but were additions to the complement in the jobs affected; (2) that many promotions, demotions and transfers were made between August 1, 1960 and August 8, 1960 in contemplation of the strike's end and contrived to defeat the agreements; (3) that promotions, demotions, and transfers were made during the period of the Strike Settlement Agreements, so as to deny registered strikers on the preferred hiring list the right to recall.¹⁴

¹⁴ PX-371 - Plaintiffs claimed 387 blocking transfers varying in their duration effects from entire settlement period to minimal periods. (Tr. 9623).

The defendant's position on this issue is that during the "actual strike period" no labor agreements existed since the prior ones had expired, and therefore it had the right to transfer, promote and demote at will, consistent with its employment needs, even to cross occupational code, department, seniority area lines (Tr. 3118-19); and that it did in fact do just that. However, thereafter during the "settlement period," it was entitled without qualification to transfer, promote or demote an active employee from the job he was performing to another job, provided it was within the same occupational code and seniority area; and this was true even though there were more senior employees on the preferred hiring lists who could have performed the job (and at Hamilton had the demonstrated ability to perform the job) to which the junior employee was transferred, promoted or demoted. Defendant claimed that its rights were the same as when it had men out on layoff and that these practices had been in effect for twenty years in the layoff situation. (Tr. 4974, 6149-53, 9590-92, 9280).

The defendant stipulated and admitted that it had made transfers during the settlement period and had made promotions and demotions, but only within the same occupational code and seniority area, both of strikers and non-strikers, believing it had the right to do so, just as had been the practice during previous periods of layoffs. (Tr. 4711-12, 4120, 6124). It represented that if it had been barred from making these transfers, whether they were promotional, lateral, or demotions, the defendant would have been faced with the problem of recalling registered strikers from the preferred hiring lists and ending up with more employees than it had work for or, in the alternative, laying off people who were already on the payroll. (Tr. 4338-39, 9503; see also Tr. 4128).

The defendant maintained that the historical precedent between the parties in the layoff situation, as well as the wordage of the Agreements, obligated it to use the pre-

ferred hiring lists only before new employees were hired; and if the Court were to interpret and apply the Agreements otherwise, it would in fact be rewriting the contract in accordance with its own subjective theories of industrial management and employee relations and not as the parties had agreed in their settlement contracts.

As to the first two categories, which relate to the actual nine-week strike period, the Court has no problem. The defendant did have the absolute right to transfer and promote into permanent positions, in the same manner that it hired new permanent employees into the complement during this period. The mere fact that some of these changes occurred during the week preceding the strike settlement is irrelevant. At that time, there existed neither labor contracts nor settlement agreements and until they were subsequently ratified by the membership, no one knew with certainty whether either contract would ever be agreed upon.

Transfers and promotions from date of origin for which the record paper work had been commenced and was in process on or before August 8, 1960 (in the case of Hamilton) and August 9, 1960 (in the case of Pratt & Whitney) were valid, even though a change of status slip had not been fully processed and the effective date actually accrued after the settlement ratification. (Tr. 9203-04). This paper work sometimes took up to two weeks to process. In particular, this was normal where a vacation period intervened, as had occurred during the month of August in this instance. (Tr. 9265).

Paragraph 4(c) of the Pratt & Whitney Strike Settlement Agreement provided that where no job was available under paragraph 4(a) and 4(b) the striker's name would go on the preferred hiring list and he would be recalled to job openings in their occupational groups and seniority areas which developed prior to January 1, 1961, *before new employees were hired*. It provided that the strikers would be recalled to such job openings in the order of their seniority pur-

suant to Article VII §§ 1 and 2. The Hamilton Strike Settlement Agreement was substantially the same except that the recall priority provisions were subject to seniority and demonstrated ability, as referred to in the labor contract, which was incorporated in the Settlement Agreement by reference.

Defendant's Exhibit 34 (Hamilton) and defendant's Exhibit 45 (Pratt & Whitney) (Tr. 5498-5501) spell out the general ground rules which the defendant applied in filling available jobs under paragraph 4(c), (so-called phase (3)). It established the guiding principle that the most senior active employee, who held the same job (job code, department and shift) at the time of the strike, but who had returned to a different job at the end of the strike would be offered the opening first; the defendant considered its first obligation to be the "making whole," those active employees who had not yet been returned to their former status. (Tr. 4765, 5372, 5936). If this procedure was not feasible, defendant would then consider filling the job opening by the transfer of another qualified employee. Only after the exhaustion of these sources, did the preferred hiring list come into play in the defendant's administration of the Strike Settlement Agreements.

The plaintiff-unions' posture is that these procedures violated the Strike Settlement Agreements, as properly construed. (See also, Tr. 4907-08). It emphasized that the promotion or transfer of active employees who were at work in the plant, in preference to those inactive employees awaiting recall on the preferred hiring lists was an attempt to grant an unlawful preference and divide the strikers. (Tr. 7960-61). However, the defendant pointed to the Settlement Agreements which contained no restrictions against transfers or promotions, except as applicable in a layoff situation, where employees with recall rights were entitled to preference only before new employees were hired.

The basic controversy centers on whether the defendant could legally establish procedures comparable to those used in a layoff situation in administering the Strike Settlement Agreements. Paragraph 4(b) of the Pratt & Whitney agreement explicitly provides that the "strikers will be treated as if they had been laid off." The Hamilton paragraph 4(b) does not include this language, but as discussed above, the parties intended it to have the same meaning as the Pratt & Whitney agreement. (See pages 47-48 *supra*).

The plaintiffs claim that it was orally agreed that all registered strikers would continue to accumulate seniority up to September 1, 1960; and that this meant that they would not be considered to be inactive and laid off until that date. They contend that between the end of the strike, August 11, 1960, and September 1, 1960, the defendant discriminated against the strikers by treating them as if they were inactive, insofar as recall rights were concerned.

Actually all those who returned before the strike ended lost no continuity of their weeks of seniority because of their having been out on strike. In similar manner, the defendant agreed that the continuity of the seniority record of registered strikers would not be affected in any way, by the fact that they had gone on strike, provided they were returned to work on or before September 1, 1960. (Tr. 2997-98, 3116-25, 5496). This provision did not in any manner change the basic meaning of paragraphs 4(a) and 4(b), in either Settlement Agreement which was to treat the strikers as laid off. It simply guaranteed to the registered strikers, for seniority purposes only, that if they were recalled by September 1, 1960, they would not lose any seniority. It was actually indicative of a fair and generous attitude by the defendant toward the affected employees. The registered strikers did in fact compete for available jobs during this period pursuant to paragraphs 4(a) and 4(b) of the Agreements, and the contracts were not violated in this respect.

From the language of paragraph 4(c), the defendant might well argue that the *only* restriction on the company was to recall strikers "before new employees were hired." Such an interpretation would leave the registered strikers without any of the protections accorded by the collective bargaining agreements. However, as indicated above, the company administered paragraph 4(c) as if the layoff provisions of the labor contracts did apply and such an interpretation is consistent with the spirit of the Agreements. But it certainly cannot be persuasively argued that the written provisions of paragraph 4(c) gave the registered strikers greater rights than they were accorded by the layoff provisions in the labor contracts.

The plaintiffs suggest that the dicta contained in a prior arbitration award (DX-21) supports their position. The relevant part states, "It was conceded by the company that if the transferred employee had less seniority in the department than employees on layoff from the department, the transfer would create a justifiable grievance." (at pp. 11-12). The arbitration dispute from which the quote is taken involved a different issue than that which exists here. It concerned a transfer which crossed over from one occupational code and seniority area into another; in such an instance seniority in the transferee might exist over employees awaiting recall on the layoff list. In the present case, however, we are concerned primarily with transfers within the same occupational code and seniority area; and no grievance or claim is made in the arbitration award referred to, that any irregularity or preference existed under the Hamilton labor contract, between active employees transferred within the same occupational code and seniority area. In fact that arbitration award in referring to such laid-off employees states:

"They first must be offered employment in the given department in accordance with their seniority and demonstrated ability 'before new employees are hired.'

It contains no restriction upon the transfer circumstances of a layoff. The union has shown that this could frustrate seniority rights of an employee on layoff. The Arbitrator, nonetheless, cannot ignore Section 3 and add to the expressed limitations to provide greater protection to the employee on recall." (DX-21, p. 15).

These interlocking agreements were prepared by the defendant and must be construed to effect the intent of the parties; however, wherever ambiguity exists it should be construed against the drawer of the agreement. This Court may not add to the contracts' wordage. The language used is not subtle, misleading or ambiguous.

"If the language used is plain and unambiguous, it must be given its natural and ordinary meaning. . . . The effect of the contract must be determined by the intent expressed in it and not by an extraneous intent which may be claimed or believed to have been in the minds of the parties." *Leathermode Sportswear, Inc. v. Liberty Mutual Inc. Co.*, 150 Conn. 63, 66 (1962).

See also, 17 AM. JUR. 2d, Contracts, §§ 241, 245.

Under the wordage of the Settlement Agreements the labor contracts and the supplemental agreements relating to management's reserved prerogatives in the "Witnesseth Clause," the defendant had the lawful right under the Pratt & Whitney and Hamilton contracts to make demotions and lateral transfers within the same occupational code and seniority area, without being required to recall from the preferred hiring list. As a practical matter, such elasticity in complement movement within the same occupational code and seniority area has always been considered by the defendant in its past dealings to have been essential to efficient operation. Otherwise the defendant might have been required to layoff unneeded active employees,

while at the same time recalling others from the preferred hiring list to the same occupational code and seniority area or carrying the temporarily unneeded surplus help as an extra expense. (Tr. 4338, 9503). Vandervoort claimed it was well known to the unions, at least at Hamilton, that transfers and promotions were not stopped or barred by the Settlement Agreements. In fact the union president was such a transferee himself (Tr. 4333-34, 4120) and no complaint was made. (Tr. 4974-76, 4199).

The Recall Agreements provided no guarantee that all registered strikers would be returned to work before January 1, 1961. On the contrary, it expressly provided in both agreements that those not recalled by that date would lose all further contractual preference. Unless the phrase "before new employees are hired" which appears in paragraph 4(c) is to be declared a nullity and meaningless, it must be interpreted to modify and limit the contract words, "Strikers . . . will be recalled to job openings which develop . . . before new employees are hired." Thus, before the company can hire from outside the plants, it must recall from the preferred hiring list, pursuant to the seniority terms of the collective bargaining contract.

While this agreement may appear to be somewhat harsh and unfair, from the point of view of protecting the senior registered strikers who were adversely protected, nevertheless, the Court is bound by the written contract. It has not been asked to reform it, nor does it have the right to rewrite its agreed terms in a manner to suit the Court's own sense of what could or might have been incorporated within it.

Plaintiffs argue that the requirements of federal labor law policy as exemplified in *NLRB v. Fleetwood*, *supra*, and *NLRB v. Erie Resistor*, *supra*, have enlarged the rights of the regular strikers under the Agreements so that the company's procedure of transferring employees was invalid.

The Strike Settlement Agreements in this instance anticipated *Fleetwood's* requirement of establishing what was tantamount to a preferred hiring list. And furthermore, defendant's utilization of this list conformed to *Fleetwood's* philosophy that strikers be given recall preference over strangers. Nor can it be claimed that *Erie Resistor's* bar against a plan which would discriminatorily set off strikers from non-strikers was violated here. Under the terms of the Strike Settlement Agreements both non-strikers and the several thousand strikers returned to the active complement were treated equally and identically. The transferees were both strikers and non-strikers. The teachings of *Erie Resistor* never contemplated prohibiting an employer from meeting his personnel requirements within the terms of the prevailing collective bargaining contracts.

It is important to note that plaintiffs' claim that the Settlement Agreements were intended to expand their rights under federal law is not valid. Paragraph 4(a) met all the requirements of federal law as it had been interpreted through 1960. Thus paragraphs 4(b) and 4(c) substantially expanded the strikers' rights.

Thus the Court does not need to consider the question whether the Strike Settlement Agreements, negotiated by competent equals, waived rights under federal law; a question left open in *Fleetwood* (389 U.S. 381n.8). Nor need the Court consider whether, on the facts of this case where the company in good faith substantially exceeded the existing requirements of the law, subsequent changes in the law should be retroactively applied.

Based upon precedent and the historical dealings between the parties, only in those instances where it can be shown that transfers in fact were made across occupational code and seniority area lines, to the prejudice of employees on the preferred hiring lists who retained seniority status, can it be validly claimed that the preference was in violation of the Settlement Agreements and Article VII of the

labor contracts. (Tr. 3568-69, 3792-94, 6124). In any such instance, a senior employee on the preferred hiring list, who was so prejudiced, would be entitled to be restored to his rightful position and reimbursed for his actual damages.

Under Article VII § 1(a) of the Pratt & Whitney labor contract, employees were to be laid off and recalled by noninterchangeable occupational groups within specified seniority areas in accordance with seniority. There was no restriction on lateral transfers or demotions within the same seniority areas. It was common custom for the employer to demote or change the status of shifts. Generally the less senior people would end up by being bumped downward into a lower labor grade as the labor complement became restricted and the deeper the layoff the more heavily would be the invasion of the lower grades by this bumping technique. (Tr. 5379-81). In inverse order, as the complement was recalled back to work and a broader scope of higher rated jobs were needed to do the work, those with higher seniority at Pratt & Whitney and those with higher seniority and demonstrated ability at Hamilton, in their respective seniority areas were recalled.¹⁵

Under normal layoff conditions, procedures generally operated so that employees who had greater seniority were the last to be laid off. Thus even where lateral transfers or demotions were made to lesser grades during layoff periods, the most senior employees still remained actively employed in their respective seniority areas, although at

¹⁵ In the case of a layoff at Hamilton there was no automatic way to determine whether your seniority would protect you from lay-off; seniority and demonstrated ability were both factors to be considered. (Tr. 1861). The mere fact that an employee had more seniority would not protect him from layoff, if the retained employee had experience on the particular work; that is, demonstrated ability to do the particular work. Retention lists centered around that principle. The union checked to determine whether or not the senior laid off employee had ever performed the work that the person retained performed. (Tr. 1862).

a lower job grade. As recalls were subsequently made to increase the complement, transfers and promotions were in order to restore the demoted employees from their lesser grades to their former status. The defendant-company insists that this was the intended procedure in the administration of the contracts, except that the preferred hiring lists became a factor only before additional help from outside the plant was to be considered for employment.

An overall consideration of the contracts does not support the defendant's position in two categories, waivers and promotions. Whenever a registered striker was sought from the preferred hiring list and offered employment in a job-grade less than that which he held before the strike, but in his occupational code and seniority area, as the Agreements required, the defendant permitted him to sign a waiver indicating his election to wait for the vacancy in his former job grade, providing it occurred before January 1, 1961. (PX-56, PX-57; Tr. 1988, 4800). In such event, the next less-senior registered striker was offered the job opportunity. If the latter accepted, he became an active member of the complement; and when the higher job grade opening in his pre-strike job subsequently became available, the defendant, regarding its primary obligation to be the "making whole" a senior "active" employee (DX-34) promoted him to his former status (Tr. 5372), which job in some instances was the original job held by the more senior employee who had signed the waiver. This action was not wholly regarded by the defendant as a promotion, but simply as a restoration to the job which he formerly occupied.

This type of preference to the active employee, constituted an unlawful discrimination and administrative breach of the Settlement Agreements. This also applied to any transfer of a less senior employee into the old job (same job code, department and shift) of a striker who had signed a waiver. The defendant had by its administration of the

Agreements introduced a new element into the contracts, when it formulated the waiver procedure. It was assented to by the individual registered striker upon his execution of the waiver. (PX-56.) In so doing, the latter elected to await a vacancy in his former pre-strike job, where he held conceded seniority. He had every right to expect the defendant would recall him to his former job (same job code, department and shift) when it became available; particularly when the evidence does not demonstrate, that it was fully disclosed to him that his waiver, as a matter of administrative practice, would permit the defendant to restore a less senior active employee to his job, when it did open up and become available. The defendant's subsequent filling of this job by a transfer of an active employee, in preference to the inactive employee on waiver who had the greater seniority was discriminatory and violated the lawful administration and spirit of the Agreements.

"(W)hen an employer promises to rehire striking employees as soon as their positions again become available, he may not discriminatorily violate this undertaking." *NLRB v. Roure-Dupont Mfg., Inc.*, 199 F.2d 631, 633 (2d Cir. 1952).

The specific number of transfers which blocked more senior people who had signed waivers and their individual identity was not offered as evidence in any Court exhibit. Unless counsel can stipulate to the identity of the persons affected, a special hearing will be necessary, either before this Court or before a Special Master appointed by the Court, to ascertain the people who were prejudiced and the amount of damages to which each may prove he is entitled.

Conceding that the "Witnesseth Clause" of the labor contract did reserve to management the right to make promotions and the historical labor relations of the parties during the lay-off supports that practice, it must be borne

in mind that, except for the special retention procedures at Hamilton, the general circumstances of layoff resulted in the retention of the most senior employees in the active complement. Thus, as previously stated, any transfer for promotion of those most senior remaining at work, could not harm seniority-wise those still awaiting recall. However, during the post-strike settlement period, it was a different situation. There were many on the preferred hiring lists, who enjoyed greater seniority than those in the active work complement. Thus, whenever the defendant-employer promoted an active employee into a vacant job without regard to those who had greater seniority in the same occupational group and seniority area, it was doing violence to the spirit of Sections 7(b) and 8(b) of the Hamilton and Pratt & Whitney labor contracts, respectively. The provisions of each section state:

"No employee shall be eligible by reason of his seniority to be transferred to a higher-rated job as a result of layoff."

Since the letter and spirit of the Settlement Agreements was to treat those on the preferred hiring list awaiting recall as if they had been laid off, those promotions made during the settlement period, which did violence to the seniority of those on the preferred hiring list constituted an unlawful preference of the active employees. If it had not been considered to be a violation of seniority, such a promotion would not have been restricted in the labor contract. The Court's finding applies whether the promotee was a non-striker or a returned striker. (Tr. 7937, 6978).

According to the defendant's own exhibit, (DX-78) 35 of the alleged blocking transfers were promotions to jobs where 121 registered strikers were awaiting recall to work from the preferred hiring list. (Tr. 9206-8). Of the 121, 50 were recalled in 1960 and 33 in 1961. (Tr. 9213). Four of these two in job code 311-1-5 and two in job code 311-11-6

were promotions which originated on August 8, 1960 and made effective August 15, 1960. The latter date was the following Monday, which was customary procedure, in order to conform to the commencement of a new payroll period. Since the origin of these four promotions occurred on the last day of the actual strike period, the Court finds that these specific promotions were valid. While it may be argued that the defendant did this in anticipation of the settlement, it is equally plausible to claim that since the Pratt & Whitney membership originally voted down the settlement proposal August 7, 1960, it was not likely that Hamilton's membership would act contrary, or that the Pratt & Whitney membership would subsequently reverse its position on August 9, 1960.

One promotion in job code 219-19-5 and four in job code 3-302-5 were originated on August 11, 1960 and August 19, 1960, respectively, to correct classifications so that the record would correctly reflect the work the employees were actually doing. Since this originated subsequent to the Settlement Agreements, the Court will consider these promotions to be unlawful as a preference over senior registered strikers awaiting recall, unless at a subsequent hearing in damages, the defendant can satisfy the Court by tangible evidence that the record promotion was in fact but a clerical correction.

The remaining 26 promotees were promotions from one job to another in the same seniority area. While the defendant claims this latter group simply reflects normal advancement of employees at work, several indicate the jumping of one or more labor grades. When these promotions were made, there were 121 registered strikers awaiting recall into these positions (DX-78), some of whom enjoyed greater seniority than the promotees. The identity of the specific registered strikers affected and the actual damages, if any, to which each such person may prove he is entitled, shall be reserved until the hearing in damages.

SUMMER HIRES

The issue to be resolved here is whether the defendant's "summer hires" were "temporary replacements" for strikers notwithstanding the employer's personnel department's use of the labeled identification of "temporary hire" for some and "permanent hire" for others. In order to resolve this issue, a perspective of the historical and current use of summer hires by this defendant-employer, is essential.

Prior to the summer of 1960 and since that time, the defendant maintained a summer hiring program; sometimes it was limited to the children of employees, to assist them in their educational expenses (Tr. 6276-77) and at other times it was open to the public. During the past ten years, the defendant did not employ "summer help" during three or four of those years. It was used in part to offset the effect of vacations. (Tr. 6254). During the strike period, in the summer 1960 (Tr. 6277) Morse notified the employment offices at Pratt & Whitney that there would be no summer program that year and all those hired would be classified as permanent. (Tr. 6262-63). The reason advanced was because conditions were too unsettled. (Tr. 5469-70)). Unlike those at Pratt & Whitney, the summer hires at Hamilton were classified as temporary help.

The difference in the two personnel classifications actually involved the insurance benefits attributable to each. The temporary employees' classification excluded eligibility for the health insurance program, (Tr. 3542) apparently because of the expected limited duration of employment; while the permanent classification permitted membership in that program. The permanent classification, subject to the 90-day probationary period, also included other benefits, such as retirement, holiday pay and vacation credit, but those do not require comment, because they are not materially relevant to this issue.

Plaintiffs represent that at Pratt & Whitney there were 842 terminations in the late summer and early fall, on which the termination date information indicates that the reason for leaving was educational. (PX-135, Tr. 1958-60). At Hamilton (Windsor Locks) there were 32 such terminations (PX-52; Tr. 1976) and 26 at Broad Brook. (Tr. 1979). Vandervoort, the Hamilton personnel manager, represented that, except for the 30-40 summer hires, all others hired were permanent. (Tr. 3815).

There was no evidence offered by either party to indicate that the number hired into the summer program at either Pratt & Whitney or Hamilton, during 1960, was disproportionate to the numbers hired during a similar period in any prior or subsequent year. Certainly, they were not the same trainees, apprentices and instructors or other non-bargaining unit salaried employees, who were obviously temporarily placed in strikers' jobs specifically as a stop-gap measure to offset manpower shortage while the strike continued.

The defendant's arbitrary personnel record classification alone is not a persuasive determination of the issue. Prior to this year, all employees hired under a summer hiring program, were classified as temporary (Tr. 6273); however, in those years when no summer hiring program was in effect, defendant did hire some applicants as permanent hires, whom it had reason to expect would return to school in the fall. (Tr. 6274, 6261). During the summer of 1960, Pratt & Whitney did hire into the permanent employee classification summer employees whom it had cause to believe would return to school in September. (Tr. 6261, 6277, 6281). They were employed in the customary manner, much as in prior years, except for arbitrary "permanent" classification used at Pratt & Whitney and the usual "temporary" one used at Hamilton.

The real question in issue becomes simply this, is the term "temporary replacement," which is a word of art in

labor law, synonymous in meaning with the defendant's use of the labels "permanent and temporary." For if they are truly "temporary replacements" their jobs must be vacated to the strikers, whose jobs they filled at the strike's termination. However, plaintiff's counsel readily concedes that although they were not in fact permanent replacements, since they were hired for a limited period of time, such as the summer period or until they returned to school, they are entitled to remain in those jobs for that period for which they contracted, but in no instance should this extend beyond September 30, 1960. (Tr. 686-88). Thus, the company was under no obligation to immediately discharge the summer hire replacements to make room for strikers.

"Employer was justified in refusing to discharge student replacements, upon economic strikers' unconditional offers to return to work, since (1) replacements were hired for definite period, until opening of school term, and (2) they were not hired to break strike, but to enable employer to carry on its business." *Larkin Coils, Inc.*, 127 N.L.R.B. 1606, 1613-14, 46 L.R.R.M. 1238 (1960).

Morse represented that it was the defendant's practice during the settlement period to recall a registered striker from the preferred hiring list to any job, which became available as a consequence of an employee's termination. However, the availability of the vacated job was dependent upon the defendant's personnel department's unilateral decision of whether the job could or should be filled from within the active complement, by the transferring of other qualified employees or whether the appointment should be made from the preferred hiring list. It is with this latter administrative treatment that the plaintiffs take issue. (Tr. 6267-70).

Summer hires, with few exceptions, were essentially of a temporary character. It could not be persuasively argued that during a normal period of employment, the seniority provisions of the labor contracts would permit summer hires to replace employees on layoff. Summer employment was recognized as a program of temporary new additions to the regular labor complement during the school vacation period. While on occasion some temporary summer employees received work assignments to jobs where regular employees were on vacation or absent from work, when the regular employee returned, their prior job awaited them.

In 1960, during the strike, these summer hires were assigned to regular job codes, departments and shifts at regular pay. Regardless of the personnel record treatment of this category of employee, where the Pratt & Whitney Division treated them as "permanent" (Tr. 9570) and Hamilton Division treated them as "temporary," practically all were knowingly identifiable as temporary summer help. In negotiations with the unions during the strike, Burke himself estimated that 800 would return to school in the fall. (Tr. 9552, 8838-39). Thus the Court finds that the summer hires at Pratt & Whitney and Hamilton Standard were temporary replacements. However, this finding is not intended to include those summer hires employed before the commencement of the strike; they were not replacements.

"Permanent striker replacements who, unknown to employers, were students on summer vacation were not entitled to vote in election, since Board policy is to consider such individuals as temporary employees and to exclude them from bargaining units." *Pacific Tile & Porcelain Co.*, 137 N.L.R.B. 1358, 1364-5, 50 L.R.R.M. 1394, 1397 (1962).

"College students employed during summer as replacements for regular employees on vacation were

not eligible to vote in election under rule of Brown-Forman case, 40 LRRM 1234, that such employees are temporary or casual employees having no reasonable expectancy of permanent employment. It is immaterial that these employees have signed affidavits indicating their intention to accept future employment with employer." *Belcher Towing Co.*, 122 N.L.R.B. 121, 43 L.R.R.M. 1248 (1959).

Thus, when they returned to school and their job status was terminated, those job openings became available to the registered strikers on the preferred hiring list, in those instances where the defendant elected to fill the vacancy. If it did fill the vacancy, the defendant did not have the right to exercise a carte blanche choice of transferring into these job openings from within the active complement or alternatively from the preferred hiring list. The defendant admitted that it administered the Agreements by regarding either procedure as permissible within its discretion as a matter of right. The actual number and identity of registered strikers prejudiced by the defendant's not appointing exclusively into this category of hire from the preferred hiring list can best be determined either by stipulation or if necessary, the Court or a Master, appointed by the Court, will be required to hold a supplemental hearing to make findings as to the specific persons affected where unlawful procedures were followed, with attendant provable damages.

TRAINEES & APPRENTICES

The term "trainees" is applicable to several categories of employees identifiable by separate prefix numbers. Prefix "72" was a nominal record classification used to identify as a trainee a newly-hired person during the first three weeks of his employment. It is only descriptively used so that a manufacturing department may not have the wages of an inexperienced employee charged against the efficien-

cy of the department to which he is assigned. It is but an accounting designation to free his assigned department for his lack of productivity. (Tr. 6238-39). The treatment of such employees is not in issue and will not be discussed further.

Prefix "73" was applied to a category of short-term trainees to identify them as being assigned to a special training program for a period of two to five weeks. This program was used to train new personnel, who had never been exposed to a machine. It was usually indoctrination in shop math and machine operation. (Tr. 6223, 6294). Prefix "74" was assigned to those who were assigned to an advanced training program requiring 110 weeks of training; (Tr. 5550-5) in 1960, this was curtailed to 98 weeks. These programs were designed to permit an active employee to up-grade his status by special training. (Tr. 6226). A separate and distinct program, prefix "70" was that of "apprentice," (Tr. 6294) which required 6,000 hours training over a period of approximately three years, under an agreement with the company that upon graduation he would be assigned to a skilled job consistent with his special training. (Tr. 5554-57). Short-term and advanced trainees were not part of the bargaining unit. (Tr. 5555).

During the actual strike all of the non-unit trainees and apprentices together with the instructors, were transferred into the shop and assigned duties regularly performed by strikers; the instructors, numbering between 50 and 100, continued on a salaried basis; no change of status slip was processed for the apprentices or the instructors. (Tr. 6206-08). With reasonable promptness at the conclusion of the strike, all the apprentices and instructors were transferred from the jobs they temporarily held during the strike. Within one week after the termination of the strike, the training school was re-established (Tr. 6209) and within a short time thereafter, personnel were transferred back. However, the defendant could not establish with accuracy

how many or when all the trainees were transferred back from the bargaining unit into the training program; furthermore, all trainees were not transferred back at one time. (Tr. 6210). During the settlement period, between August 10, 1960 to December 31, 1960, a number of apprentices and trainees were transferred into the bargaining unit as graduates of these programs. (Tr. 6217). The legal questions raised are whether or not the defendant breached the Settlement Agreements by failing to recall registered strikers to jobs at the end of the strike which were occupied by non-bargaining unit trainees who had been transferred during the strike and by transferring trainees and apprentices upon graduation into the active complement during the settlement period.

The Court in treating this issue, would distinguish those assigned to the training program under prefix "73" and "74" and those assigned to the "apprenticeship program." The apprentice who graduated into the bargaining unit during the settlement period did so without reference to the registered strikers awaiting recall in much the same manner as he would have done had there been no strike. (Tr. 6219-20). He had successfully completed his three-year 6,000-hour program, and obtained a certificate of completion. The company at the commencement of his training had made a commitment to him that he would be assigned to a position in the shop complement in the newly acquired skill, on condition he graduated from the apprenticeship course of training. (Tr. 6220).

Historical precedent in the respective categories of apprentice and trainee also establish a separate and distinct treatment in a layoff situation. Where a layoff occurred, apprentices continued their training and status with the defendant-employer; but a trainee who had come from occupational groups or seniority areas affected by layoffs would be transferred back into that same occupational code and seniority area whence he had come, prior to his assign-

ment into the trainee program. Furthermore, one in the latter category, as distinguished from an apprentice, was subject to layoff along with the rest of the employees in his occupational group and seniority area, if his seniority was such that he would be affected. (Tr. 6220-22). Once the trainee completed his training, the defendant claimed that the labor contract permitted it to transfer a trainee into an occupational group or seniority area even where more senior employees were on layoff. (Tr. 6226-27). The explanation advanced for this preference of the trainee over employees on lay-off status was attributed to the investment which the employer had in their training. However, the defendant insisted that the question was primarily hypothetical and only descriptive of policy, because this actual situation had never arisen. (Tr. 6227-30).

The graduate apprentices, who had acquired their certificates of skill actually possessed a contractual continuity with the defendant from the time of their original entry into the program. The defendant was committed from the beginning to place them in a job opening commensurate with their certified skill. Having fully performed the condition precedent of certification, the defendant was obligated to consummate its three-year commitment, and place the apprentice as it had previously agreed. Such a placement did not constitute a prohibited promotion; nor was it the acquisition of an outside hire in preference to a senior striker on the preferred hiring list under the terms of the Settlement Agreements.

However, trainees in prefix categories "73" and "74" did not enjoy the same status as the apprentices. Their position, even though outside the bargaining unit, was vulnerable to layoff procedures and lacked any firm contractual commitment of placement throughout the training program. Even the defendant confirmed this distinction when it instructed supervisory personnel that non-unit trainees returning to the bargaining unit should be restricted to

those seniority areas and occupational groups where there were no senior strikers awaiting recall with the same or a higher labor grade as the trainee. (Tr. 6236-38, 3230-31).

Therefore, where the defendant transferred and promoted trainees into occupational groups and seniority areas during the strike settlement period, where more senior strikers were awaiting recall, with the same or a higher labor grade than the trainee assigned to that position, such practice could constitute a promotion to the bargaining unit in violation of the Settlement Agreements. This procedural principle having been established, the individual identity of these trainees must be the subject of proof at a hearing in damages.

The trainees who were transferred into the active complement during the strike and assigned to jobs usually performed by strikers were clearly temporary replacements for the strikers. Thus, with reasonable promptness the company was obligated to return the strikers to their old jobs in preference over the trainees at the conclusion of the strike. The record does not adequately demonstrate the number or the exact time when the temporary non-bargaining unit trainees were transferred back to the training program after the strike, nor the individual identity of those who remained as temporary employees, thus blocking the return of registered strikers; this too, will be reserved for the aforesaid supplemental hearing.

BREACH OF ORAL AGREEMENT

The plaintiff-unions and the defendant had reached an agreement prior to the July 23, 1960 union membership meeting; the essential elements were embodied in plaintiffs' Exhibits 311 and 312; and also referred to in defendant's Exhibit 75, p. 3. Several of the controversial issues referred to in these proposed settlement terms were: (1) All officers and committeemen will have a job (PX-311 and

PX-312, p. 5); (2) the preferred hiring list would extend for six months (the exact wordage was that it would continue until January 23, 1961, (PX-311, PX-312, p. 6)); (3) the company would offer unrecalled strikers jobs in occupational groups and seniority areas other than those they had been in before the strike, provided they were qualified and no strikers from these groups and areas were awaiting recall; (4) the company agreed to recall strikers whose former jobs were filled to "available jobs." (PX-311 and PX-312, p. 6, items # 4 and # 5).

However, on July 23, 1960, the membership of Pratt & Whitney Lodge # 1746 soundly defeated ratification of the terms of this proposed settlement by a vote approximately 3,800 to 300. At this point all pending understandings between the parties were terminated. Negotiations were not renewed again until the informal conference called by the Governor at the Park Lane Hotel in New York City on August 5, 1960.

The union's general counsel, Papps, claimed that at that meeting he took out of his pocket a copy of the previous strike settlement agreement, which had been voted down by the union on July 23, 1960, handed it to Burke and inquired whether or not this was the "package;" the latter, Papps claims, responded affirmatively and kept the copy. (Tr. 8842-43, 8976). Burke denies this vehemently and states that this incident never happened. (Tr. 9518).

A review of the memorandum prepared three days later, August 8, 1960, by the International Union President Hayes, which purportedly summarized the areas of agreement at the conference, does not support the plaintiffs' claims that the unions' representatives understood that all of the terms in the defeated proposal of July 23, 1960 were considered to be incorporated in the alleged oral agreement of August 5, 1960. (DX-76). Furthermore, it should be noted that when plaintiffs' Exhibit 312 was offered at a National

Labor Relations Board hearing on June 19, 1964, Papps could not recall having seen it before and was unable to identify it. In fact, he stated that he thought it had been typed and copied subsequent to the July 23, 1960 membership meeting. (Tr. 8970-71). He also indicated that his powers of recall were not always dependable. (Tr. 8958, 8972). This failure of accurate recollection in this respect was accentuated further by his correction of an error in an affidavit previously submitted in a National Labor Relations Board proceeding. (Tr. 8867-70).

President Hayes was in regular communication by telephone with the local lodge officials throughout the conference at the Park Lane in New York, advising and discussing with them on what had been agreed to; and Papps was in the same room with him at least part of the time listening to Hayes' conversation. Despite the significance of the contents of plaintiffs' Exhibit 312, Papps could not recall having heard Hayes tell the local lodge officials, that the substance of the agreements in plaintiffs' Exhibit 312 had been mutually agreed upon and would constitute the basis of the proposed settlement. (Tr. 8979).

There was further controversy over whose responsibility it was to draw the final settlement agreements. The plaintiffs claimed that both legal counsel were to get together and do it; while the defendant suggested that counsel's responsibility was limited to the drawing of the arbitration submission covering the strike misconduct cases. In any event, a proposed settlement contract was prepared by Mooney, the defendant's personnel manager, and it was subsequently executed by both parties after a discussion of its terms, on August 16, 1960. Present at this final session were not only the local lodge officers, but Grand Lodge Representative Thurer, an experienced union negotiator, who had been an active participant and consultant with the local lodge bargaining committees throughout the negotiations. He acted as liaison agent for the International

and was a signator on all of the settlement agreements. He was experienced and competent to pass upon and expertly advise the local committees. While both parties were represented by counsel, neither party had counsel present when the agreements were finally discussed and executed. (Tr. 931-32).

General Counsel Papps claimed that he had not been consulted on the form of the final draft (Tr. 8848) and had not seen it prior to its execution. Burke denied that he ever represented at the August 11, 1960 meeting prior to the signing, that plaintiffs' general counsel, Papps, had a copy of the agreement on his desk. (Tr. 9529-30). However, eight days later, on August 24, 1960, counsel for both parties signed the arbitration submission. (DX-16). This latter agreement recited that it incorporated Exhibits "A", "B" and "C"; "A" was the Pratt & Whitney Settlement Agreement; "B" was the Hamilton Settlement Agreement and "C" was a list of the 50 strikers whose cases were subject to arbitration. Papps claimed that although he signed the original and initialed his own copy, (DX-77) the agreement had affixed to it only Exhibit "C" and defendant's counsel was supposed to mail him Exhibits "A" and "B". (Tr. 8980-86). Papps did admit that he had seen both settlement agreements at the time of the meeting on September 21, 1960, and he had not at that time made any complaint that the contract did not conform with what he and Burke had agreed. (Tr. 8852, 9531).

In evaluating the merits of each of the plaintiffs' representations, that the terms of the July 23, 1960 agreement should have been incorporated in the written settlement, it seems worthy of note, that at no time did the unions contend that past labor practices warranted union officers or officials being entitled to any recall preference. (Tr. 4843). Fraser, the Pratt & Whitney Union President, who held nine years seniority (Tr. 5848), had been on a leave of absence which terminated June 6, 1960 after the defendant

refused to consent to its extension. (Tr. 5845-46). It was subsequently agreed that he would be permitted nevertheless to register as a striker. (Tr. 5907). This raised the question as to whether or not he was entitled to recall preference, because of his being a union officer. He was reminded by Morse that the August 16, 1960 contract did not so provide; he responded that he was "just trying." (Tr. 5924). No further issue or grievance was raised on this point, by him or in behalf of any of the other union officers. Had the claim had any substance, in all likelihood, it would not have been passed over so lightly. Furthermore, it is especially significant that when the plaintiffs filed charges of unfair labor practices against the defendant in November 1960, no issue was raised then concerning the defendant's failure or refusal to recall union officers and committeemen. Certainly, if there was any merit to the claim, it would have been complained of at that time. (Tr. 9023-27).

The July 23, 1960 agreement also provided that the preferred hiring list would extend for six months to January 23, 1961. This concept had its origin in the labor contract, which provided that an employee with less than six years seniority had recall rights for six months; those with over six years seniority had recall rights of one year. After the recall limitation expired, any such employee thereafter rehired had no seniority status; he was in the category of a new hire. At the August 6, 1960 meeting with Thurer, Main and Fraser, when the local union officers were reviewing what had been agreed to the previous day in New York, Burke advised them that after December 31, 1960, the procedure applicable to the preferred hiring list would not be followed; (Tr. 3006) this point was clearly understood and agreed to before the union called the membership ratification meeting.

As outlined in an earlier part of the opinion, the parties discussed the terms of the Strike Settlement Agreements

in detail and Burke accepted a change in paragraph 4(b) of the Hamilton contract, suggested by Grand Lodge Representative Thurer, to permit recall to a "comparable job." (see *supra*). The change in paragraph 4(b) of the Hamilton agreement was mutually assented to and the final drafts of both contracts were executed on August 16, 1960.

The Court finds that the plaintiffs have wholly failed to prove that there was any oral agreement whose terms varied from those embodied in the Strike Settlement Agreements as finally executed. Furthermore, even had there been such an oral agreement, the written Settlement Contracts became the repository of all antecedents oral understandings of the parties. These prior discussions were merged into the written contracts. It is especially important in the field of labor relations, where bargaining committees and varied groups of individuals are involved, that a dependable policy which encourages reliance on objective written documents and outlaws subjective impressions should not only be encouraged, but adopted. 4 WILLISTON § 631 (3d Ed. 1961).

PREFERRED HIRING LIST

Both Strike Settlement Agreements provided in paragraph 4(c) that registered strikers for whom no job was available in accordance with paragraphs 4(a) and 4(b) would be placed on a preferred hiring list; and they would be recalled to job openings which developed prior to January 1, 1961, before new employees were hired. The priority of recall to these job openings at Pratt & Whitney was in accordance with their seniority under Article VII, Sections 1 and 2 of the labor contract and at Hamilton, in accordance with the principles of seniority and demonstrated ability under similar contract provisions. Preferred hiring list disputes were not subject to the regular grievance procedures under the labor contract. They were dealt with through a special procedure agreed to by the parties,

wherein the issues would be reviewed with the division personnel manager with right of appeal to Personnel Director Mooney. (Tr. 4859-64).

As previously explained, when recall had been completed at Pratt & Whitney under paragraphs 4(a) and 4(b), the residual registered strikers constituted the preferred hiring list (Tr. 530, 544-45) and a change of status slip was made transferring said strikers to a nominal "plant 90" for purposes of records control. (Tr. 534-36, DX-46). It was kept current by removing the names of those who terminated, because of resignation, death, retirement, discharge after arbitration or failure to answer recall. "Plant 90" was the reservoir from which the defendant recalled strikers before new employees were hired from the outside. At Hamilton the process was the same, except nominal "plant 800" was used for Windsor Locks strikers and nominal "plant 900" for Broad Brook. (Tr. 534-36); and the actual registration cards were used rather than the change of status slip. (Tr. 4949-50).

A listing of registered strikers similar to a layoff listing by job code and department was first prepared upon conclusion of registration, so that strikers could be returned to their identical jobs under 4(a). Following the first listing, a list of all the registered strikers, including those on the first listing, was arranged by occupational group and seniority area and was prepared to administer paragraphs 4(b) and 4(c) of the Settlement Agreements. (Tr. 5486-90, PX-109).

The plaintiffs claim that the defendant breached the settlement contracts, because no actual piece of paper containing a list or column of names in order of seniority, by seniority area and occupational code was prepared, so as to establish a preferred hiring list as the contract required. Plaintiffs claim that when there was a layoff, the company traditionally and historically prepared layoff lists and that these were made available for the plaintiffs to see.

(Tr. 243). The defendant on the other hand represents that the original striker registration cards and the change of status slips which were kept current, constituted in fact the most functional preferred hiring list for administrative purposes. (Tr. 214, 4874-75, 9595-96.) The plaintiffs, for the first time, became aware of the type of listing being used, at an arbitration panel hearing concerning cases related to strikers' misconduct during the strike. (Tr. 894).

Ordinarily when there was a layoff, the Data Processing Department was called upon to prepare a special runoff list dealing with seniority areas and occupational groups. (Tr. 4872). The information contained thereon, relative to those who were to be laid off or retained was usually reviewed with the chairman of the unions' shop committee in the personnel office; and while he was never given a copy outright he was invited to come in and to transcribe the essential data therefrom.

When the unions requested a listing of the employees still awaiting recall from the preferred hiring lists (Tr. 6130), the defendant refused to prepare it and instead invited the plaintiffs, as was the custom, to send their representatives to the personnel office to get the required information from the master personnel records. Morse represented that had the unions accepted the defendant's offer, at Hamilton they could have promptly transposed the essential data from the company's record cards to their own original listing of registered strikers; and at Pratt & Whitney they could have similarly transcribed it to their own copy of the original registration cards previously given to them by the defendant. The unions adamantly refused to visit the defendant's personnel offices to procure these listings, claiming they were under no obligation to do so. The impasse on the exchange of this information followed.

The defendant customarily furnished the plaintiffs with all the factual data which the labor contract required; the

detailed job classification sheets (Art. VI. Section 12); the quarterly records with the names of those who had received a base rate increase as a result of performance rating; and a semi-annual listing showing the seniority of the employees. (PX-95, Art. VI, § 15, Art. VII, § 4; PX-93, Art. VI, § 15, Art. VII, § 6).

Under the previous collective bargaining agreements, (PX-92, Art. VII, § 6, p. 21, PX-94, Art. VII, § 5, p. 23) the unions had received a seniority listing showing in order number, the clock number, the names of employees, date of hire, seniority code (weeks of seniority) and the department. (PX-21, 2(d), PX-22 (3-53), PX-22 (3-54)). The most recent seniority listing prior to August 11, 1960 at Pratt & Whitney was August 1959, because a new contract had not been consummated; and at Hamilton the most recent seniority listing was in January 1960. The next such listing under the terms of the new labor contracts of August 16, 1960, were to be provided in February 1961. (Tr. 1480). At the time of the original registration of the strikers in Lodge #743, a list was compiled showing the name and clock number of each. (PX-163, PX-22(1), pp. 48-49; Tr. 1721-22, 1726-27, 1740, 1840-44, 3311-12). Similarly, Pratt & Whitney furnished to Lodge #1746 a data processed list of registered strikers, showing name and clock number. (PX-160, Tr. 5478, 898-903, 1437-38, 1914, 8996).

The necessary factual information sought by the unions was not denied to them. Had they sent competent people to the personnel office to procure this information, as the defendant had repeatedly invited them to do and as was the custom on a layoff, the records were not so complex, but that adequate information to police the Agreements could have been readily and promptly obtained in respect to the preferred hiring lists without unreasonable expense. For the plaintiffs to adamantly sit back, make no effort and refuse to do anything to obtain the information through their own efforts and expect the defendant to

supply it solely through company effort and at company expense was not responsible union conduct. Had the plaintiffs sought out the information at the personnel office and the defendant then showed lack of cooperation, evasive conduct, or an intent to frustrate a reasonable disclosure, the plaintiffs could then with some justification make claim to the defendant's bad faith in administering the Settlement Agreements. The Court finds that a practical and functional preferred hiring list existed by the use of the registration card method and it was in fact regularly maintained by the defendant in the administration of these contracts; the defendant was not guilty of wilful concealment or other unlawful conduct in respect thereto.

DISCLOSURE OF RECORDS

The plaintiffs vigorously challenge the defendant's exercise of good faith and fair dealing in its performance of the Strike Settlement Agreements. One aspect of their claims is based upon the theory that the defendant deliberately concealed business records from the plaintiffs and refused to disclose data essential to the latter's effectively policing the Strike Settlement Agreements. (Tr. 947, 1014). Having already treated the preferred hiring list issue, that phase of the case will not be repeated here.

The parties' controversy over disclosure of records began some years before the strike. From 1953 through 1960, the defendant had negotiated several collective bargaining agreements with the plaintiff-unions. During this period, the unions claim they were not aware of the existence of a bi-weekly runoff list (PX-21(a)(c)) containing detailed data on seniority, which if known by the plaintiffs would have been of assistance to them in policing the contracts. (Tr. 871-73). Plaintiffs represent that the existence of such a so-called seniority list at Pratt & Whitney came to their attention on September 10, 1963 (Tr. 927) in Coward's deposition; and in respect to Hamilton on October

24, 1963 in Vandervoort's deposition (Tr. 1897). The first time they claim to have seen them was in February 1964. (Tr. 435).

Coward, a programmer and analyst in Personnel, stated that her best recollection was that she had helped prepare the bi-weekly runoff lists since 1958. (Tr. 1298). They contained the job codes of both the bargaining unit employees and non-bargaining unit employees. (Tr. 439, 1309). Before the lists could have been given to the unions, non-bargaining unit employees would have had to have been excluded, a task requiring extra work of a day or so. Furthermore, the company asserted that the lists could have been of value to the unions only if they were arranged by occupational codes within seniority areas, so as to show the relative seniority of all the bargaining people within those occupational groups and seniority areas; it might have taken two to three weeks additional work to so rearrange them. The number of personnel required does not appear in the record. (Tr. 1319-22).

Plaintiffs' witnesses stated that as early as 1951, they had learned of a data process runoff similar to plaintiffs' Exhibit 21(2)(d), (the seniority lists given to the unions every six months by the company), but which contained more information. (PX-162; Tr. 1486, 1499). The defendant explained that this data was specifically sent in reply to a special request on August 10, 1950, (DX-8, Tr. 2971-75) by the then president of the union, who sought a list of all employees in each unit, by department, clock number, classification, labor grade, hourly rate and merit rating, together with changes which occurred between June 1, 1949 and June 1, 1950. (Tr. 3046-55). The union's Financial Secretary Danahy recalled having such a list similar to plaintiffs' Exhibit 162, but could not recall whether or not it was in response to this specific request. (PX-162, DX-8; tr. 1936, 1940-45). The union denied that it was specifically sent and claimed that at a subsequent grievance hearing

when it was mentioned by the union representative, Korper, an assistant to the superintendent at the time, responded that it had been given out in error and would not be available again. (Tr. 1499).

The defendant represented that these regular runoff lists (PX-21(2)(c)) were departmentalized while plaintiffs' Exhibit 21(2)(d) was not. However, as long as the person seeking the information obtained the clock number of the employee, the seniority data sought could easily be obtained from plaintiffs' Exhibit 21(2)(d). (Tr. 1522-3, 1573). The bi-weekly runoffs were treated by the defendant as routine work papers for the wage and salary division (Tr. 425-431) which was required to check merit rating classifications. (Tr. 435-38). Personnel Director Mooney represented that he himself was not aware of the existence of such a bi-weekly runoff at Pratt & Whitney or Hamilton until the issue was raised in the current Labor Board case and in this proceeding. (Tr. 3058-59).

There had been a continuing controversy over the years as to whether the union should bear the cost of furnishing or maintaining records which the union claimed it required. (Tr. 1599). In fact, as early as September 11, 1953, Lodge # 1746 had requested detailed information and when the request was resisted, charges were filed with the NLRB and the Regional Director refused to issue a complaint. An appeal was filed, but it was voluntarily withdrawn by the union before it was acted upon. (PX-67; Tr. 1834, 2977-78). In 1955, detailed information was requested again (PX-73, PX-74; Tr. 1830-31), which was refused by the defendant. However, throughout the exchange of correspondence, the defendant offered and held open and available to the unions the open scrutiny of all of its own basic personnel records. A condition was that the unions' inspection and analysis of these records should be done in the defendant's offices. (PX-69-72, PX-74). In fact, after the unions requested certain information on May 27, 1955 (PX-

68), they did send representatives to defendant's personnel office to review the records and transcribe information. No complaint was made as to the effectiveness of the project. (Tr. 5449-51). In 1958, the unions again inspected and analyzed certain basic personnel records to procure relevant data. (DX-41, DX-42; Tr. 5461-64).

Throughout their course of dealings, this latter procedure was recognized in practice. On January 1, 1959, when 600 employees were laid off at Hamilton, Seedman, the President and Shop Committee chairman, went to the plant on that day and copied the proposed layoff list and supporting data and discussed the propriety of retentions with a personnel officer. (Tr. 1745). Similarly, when Copc reviewed the layoff list at Pratt & Whitney, he went into defendant's personnel department to copy it. (Tr. 1477). As far back as September 1955, the union had sent four employees into the plant offices at Pratt & Whitney to make a survey of the employees by name, clock number, weeks of seniority, department, occupational code, last raise, labor grade, classification, job rate, and last merit increase and amount. (Tr. 1354-58). The assigned personnel were generally untrained to do that work; and Hislop explained that she quit after one week because there was too much talking and a waste of time. (Tr. 1367, 1385-6). The information was never used. (Tr. 1388).

It is significant to note that throughout the decade preceding the strike, several contracts were negotiated between the parties, wherein it was agreed that certain specific information would be provided to the union at defendant's expense:

(1) Wage check-off	Art. IV, §§ 1, 5—P&W
	Art. IV —Hamilton

- (2) Seniority list of employees Art. VII, § 6 —P&W
furnished to union each 6 Art. VII, § 4 —Hamilton
months in January or Feb-
ruary and during the sum-
mer. (PX-21(2)(d)). (Tr.
1609).
- (3) Detailed job description Art. VI, § 12 —P&W
sheets covering new or Art. VI, § 12 —Hamilton
changed hourly-rated jobs,
within 30 days following
approval of such jobs.
- (4) A quarterly record of Art. VI, § 15 —P&W
those in prior calendar Art. VI, § 15 —Hamilton
quarter who received an
increase in the base rate
as the result of a perform-
ance rating. These shall
include department num-
ber, job code, previous
base rate and rating of
employees. (Tr. 1585-86).
- (5) Layoff lists. Art. VII, § 5 —P&W
Art. VII, § 3 —Hamilton

There appears to be no quarrel with the fact that this data was satisfactorily furnished in keeping with the labor contracts. During 1960, after the strike, the defendant took the unions' fifty volume files of job description sheets, which had been poorly kept up by union office personnel and brought the records up to date. (Tr. 1603-05).

The plaintiffs claim that the defendant should have made available to them the bi-weekly runoff lists containing detailed data on seniority during the settlement period. They represented that the regular labor contract seniority list (PX-21(2)(d)) which was prepared every six months was the only seniority roster available to them. It had

been last prepared before the strike in the summer of 1959 and the plaintiffs report that it was obsolete and useless to them in administering the Settlement Agreements. The new one did not become available until February 1961 under the terms of the 1960 collective bargaining agreements. (Tr. 1480).

On October 13, 1960, Lodge # 1746 and Lodge # 743 simultaneously requested of the defendant, certain personnel data (PX-75, PX-76) relating to the administration of the Settlement Agreements. The defendant responded on October 21, 1960 to each (PX-77, PX-78) advising the plaintiffs that the registered striker lists were already in their possession and that no formal listing of the specific information sought was maintained by the defendant-company. It invited the plaintiffs to inspect and analyze the personnel records kept by the company so that they themselves might compile the specific information sought. The plaintiff unions instead responded by reiterating their requests for detailed information in a successive series of correspondence. (PX-79-91; Tr. 895-99, 909-14). The defendant's reply to each was substantially the same. It repeated the absence of a formal business record, which would give the specific detailed information sought and invited the plaintiffs to examine the appropriate basic personnel records at defendant's office to procure the information. (Tr. 904, 3907).

Defendant's data processing analyst, Justus Littel, who supervised a department of 275 employees, expressed the opinion that the available runoff lists on October 13, 1960 would only give the information as to what jobs were filled and by whom as of the day they were run; it would not historically disclose whether or not they were the same jobs they had occupied four or five months earlier. This information could be obtained by putting the data on punch cards at considerable expense. (Tr. 1265-68). Programmer and analyst Coward explained that the informa-

tion requested in plaintiffs' Exhibit 75 could not be furnished by the defendant from the IBM electronic system in effect prior to May 1961, unless the cards were specifically punched for that purpose. She stated that this would be a formidable job. (Tr. 1328-32).

She explained further that to inquire about and tabulate 4,500 employees out of the 16,000 total complement, one would have to know the statistical data on all the other people. In order to ask the machine who the replacement was, you would have to give the machine information concerning all the employees, so that the machine could test each one of them, to see who was on the job. To know who were returned to their original jobs, you would have to know the original job on June 7, 1960. She stated that she had never done a job in such volume; and it was her opinion that it would be too formidable a task for defendant to do. She stated that a project of such magnitude would be sent to some one outside the plant to do. (Tr. 1340, 1010). At all times during this letter writing exchange between the parties, the defendant expressed its willingness to provide the information, if the plaintiff would be willing to pay the cost. (Tr. 1575).

The plaintiffs' position is that the employer is obligated by law to furnish to the unions without charge, the best document regularly kept by it and available for use in policing the contracts and Strike Settlement Agreements. (Tr. 933). In this regard they place special emphasis on the bi-weekly runoff lists. Their position is that if they had been furnished the preferred hiring list plus the bi-weekly seniority list, it might have been adequate. (Tr. 934-35). The labor contract, executed five days after the Settlement Agreements, contains precisely the same provisions relating to the furnishing of lists, including layoff lists, as was provided in the prior labor agreements extending back over a period of years. (Tr. 930). The defendant-employer takes the position that the information

lists, which were required to be furnished by the defendant, have been specifically provided for in the contract; and the detailed information now sought was not within its provisions.

This issue between the parties has been continually present in their dealings throughout the past decade (DX-8; Tr. 1599-1601, 2971); but not until their relations became acutely inflamed by the animosities engendered by the strike; did it become a matter for court litigation. It is presently pending in this Court in a separate civil action, in which the National Labor Relations Board is seeking an injunction against the defendant, pursuant to § 10(j) of the NLRA, 29 U.S.C. § 160(j). The plaintiff-unions filed the complaint with the Board on November 21, 1960, but judicial remedial action was not commenced until July 2, 1964; Civil Action No. 10,535, *Albert J. Hoban, Regional Director, NLRB v. United Aircraft Corporation (Pratt & Whitney Division and Hamilton Standard Division)*. A hearing on the merits was deferred by stipulation of the parties, so that the issues in this trial might first be concluded; but in no event should the delay extend beyond September 11, 1969. The stipulation provided that the plaintiff-unions post substantial indemnity bonds guaranteeing the defendant reimbursement for the additional expense should the Court ultimately find that the law did not obligate the defendants to voluntarily furnish this service at its own expense. Both litigants have remained adamant in their respective positions on this issue.

During the strike settlement period, the plaintiffs made no attempt to inspect or analyze the defendant's basic personnel records, despite the fact that the opportunity had been repeatedly offered to them. Had a reasonable attempt been made to inspect the master wage and salary card records and other relevant data and had experience demonstrated the futility of the effort due to the absence of inadequacy of records, or had the defendant by active or

passive wilful conduct frustrated the plaintiffs' efforts, then the latter's present claim that the defendant acted in bad faith might take on a ring of substance. The bare request that statistical information be compiled by the employer and delivered to the unions, when met by the defendant's refusal under color of right, fails to satisfy the requirements of responsible union representation, especially where reasonable alternative sources of information are voluntarily offered.

Lodge # 1746 alone had 6,500 dues-paying members at \$4.00 per month (present monthly dues are \$5.00) prior to the strike (Tr. 1547, 1643); the major part of these dues were regularly withheld out of wages by the employer and turned over to the union monthly pursuant to the terms of the labor contract. There was no apparent reason why professional personnel retained by the plaintiffs could not have analyzed the defendant's pertinent personnel records during this brief period. The IAM parent International Union which received one-half the membership dues was mechanically equipped to screen the analysis through its own computer equipment. They now have a Univac III large scale data processing and computer system; and prior to the present system, they used a Sperry-Rand Univac. (Tr. 8568-69). It was conceded that the capacity of their computer equipment was available, but they were short of manpower. (Tr. 8770). Instead the union did nothing; it sat back and claimed that the defendant's position was evidence of its bad faith.

The legal obligation to furnish these records which the defendant categorizes as its "work papers" (Tr. 425-26) has never been resolved; it cannot be inferred that the defendant acted in bad faith, where there is colorable merit the defendant's stand in offering to make the records available for copying, but not furnishing the analyzed information on demand. The Court finds, that insofar as the performance of the Strike Settlement Agreements is con-

cerned, it cannot be inferred as a matter of law that the defendant, by its refusal to provide the records requested, is thereby guilty of bad faith in administering the Settlement Agreements. All relevant records were offered to be made available to the plaintiffs; the latter's own inertia was a compelling factor in their failure to procure them.

UNION OFFICIALS

During the trial the Court expressed an interest in the defendant's post-strike treatment of the officers in both unions. Detailed statistics demonstrating the respective points of view of the litigants were submitted. The plaintiffs' claims are tabulated in plaintiffs' Exhibits 269 through 280, 285, and 286.

The defendant's analysis in respect to defendant's treatment of union officials is summarized in defendant's Exhibits 67, 52 and 52(A)(B)(C)(D); and it demonstrated the period from August 15, 1960 through May 1, 1961. This is further supplemented by defendant's Exhibit 51 which reveals statistics relating to unrecalled strikers on the preferred hiring list on December 31, 1960, as well as those who were subsequently hired back from that date through November 15, 1966.

The plaintiffs advance as an indica of proof of bad faith and discrimination, that a larger percentage of union officials were not returned to work compared with the total number of registered strikers generally. (PX-285, PX-286).

<i>Returned by 1/1/61</i>	<i>Pratt & Whitney</i>	<i>Hamilton</i>
Registered strikers	76.3%	53.3%
Officers	62.5%	30.0%
Committeemen	50.0%	16.7%
Stewards	68.4%	48.0%

The modest variance at Pratt & Whitney between stewards and registered strikers or union officers and registered strikers is certainly not persuasive; no adverse inference from such statistics can be drawn against the defendant. Furthermore, selection to these union positions is a variable to which uniform averages cannot apply. A parallel finding is applicable at Hamilton, where the registered strikers' failure of recall was comparatively much deeper. It is also significant in considering the unions' accusation of company animus that although there were union officials among those charged with strike misconduct, the defendant agreed to omit those names from the list of 50, solely because of their union position. (Tr. 9010, 9028, 9034).

At Pratt & Whitney 72 of the union officials in Lodge # 1746 registered to return to work at the end of the strike, out of a total of 83 who had held the major offices.¹⁶ This latter group included the offices of president, vice-president, secretary-treasurer, trustees, sentinel, committeemen and stewards. Four of these had their alleged strike misconduct submitted to the arbitration panel and of these, two were dismissed for cause after hearing and the remaining two voluntarily withdrew their cases from arbitration and thus became ineligible. Out of a total of 68 union officials, 43 were recalled during the settlement period, and two resigned during that period, thus leaving 23 on the preferred hiring list. During 1961, seven of this number failed to respond to defendant's written invitation to seek employment and of the 16 who did apply during the first four months of 1961, six were hired; and in June 1961 a

¹⁶ Steward, the Vice-President, transferred to another plant prior to the strike; Dooley, a steward, never went out on strike; Guyette and Moquin, stewards, returned to work before the strike ended; Aarons, Lander, Messenger, Mikelis, Paulson and Wholey, all stewards, resigned and did not register to return; Danahy, the financial secretary, was not an employee. See DX-52(D).

seventh. During this period five union officials refused job offers. A substantial number of those who were recalled, received promotions and merit increases.

At Hamilton 41 of the 42 union officials in Lodge # 746 registered to return to work. Of this number 16 were returned during the settlement period to substantially the same job; included in this number were the president, vice-president, and recording secretary of the union. There was one additional union official appointed to a lesser job; and ten were subsequently promoted or received merit increases. Twenty-three remained on the preferred hiring list on December 31, 1960, one steward having resigned on August 16, 1960. During 1961, eight failed to respond to defendant's written invitation to seek further employment with the company. Of the remaining 15 union officials who did apply in 1961, three were offered employment, one failed to report and one failed to meet the physical examination.

Seedman, Union President at Hamilton, stated that he knew of no persons who were not hired during January, February, and March 1961, because of discrimination against them or against the union as such. (Tr. 1882, 1910).

A few cases require the Court's special attention and among them was Fraser, the President of Lodge # 1746. He had been on a leave of absence prior to the strike, by consent of the defendant, and the latter declined to renew this leave on June 6, 1960. (PX-222). Subsequently, it was mutually agreed that he could register with the others as a striker and thus became eligible to benefit from the terms of the recall agreement. (Td. 5906-07, 5846-47). The plaintiffs claim that since he was in a toolmaker's classification (PX-230) and such skills were already in great demand, he had been discriminated against due to his union officer's position and his active participation in the strike.

A review of his employment status is contained in defendant's Exhibits 68, 60 and 60A. His job was in depart-

ment # 96, seniority area 9, in occupational code # 500; and his job code was 475.5, job grade # 4. The Pratt & Whitney labor contract and Settlement Agreement provided that he was entitled to be recalled by noninterchangeable occupational group within his specified seniority area and in accordance with seniority, before new employees were hired. His occupational code, or family of jobs, included job code 495.1, grade # 2, 475.5, grade # 4, and 495.2, grade # 6. In other seniority areas or occupational codes, Fraser had no rights which were superior because of his seniority to someone who did have rights in that seniority area and occupational group. (PX-93; Tr. 6549-50). The seniority area in this instance was merely department # 96; so his rights would be in that department. Plaintiffs' counsel conceded that this was probably true. (Tr. 6551). This is a semi-production department, not in the mainstream of the manufacturing operations. It is where limited prototype work is done and errors corrected before mass production. (Tr. 6566). The complement on June 7, 1960 was 11; at the end of the strike there were eight. On October 1, 1960, the active complement in his job category was reduced to 7, but no new employee was added, at least through May 1, 1961. On March 4, 1961, Fraser was offered and accepted employment in D-96 in a grade 5 job in occupational code 110; but on March 7, 1961, he called in and said he would not report. Morse denied that there was ever any discussion about Fraser being next in seniority and for that reason defendant would withhold hiring. (Tr. 7022-23). From these facts, the Court finds that the plaintiffs have not proven by a fair preponderance of the evidence that the defendant discriminated against this union officer or acted in bad faith toward him in the performance of the labor contract and Settlement Agreements.

The plaintiffs claim that the defendant was discriminatorily motivated against an employee named Lyons in that it did not recall him prior to January 1, 1961. Lyons was

originally hired by Hamilton on February 19, 1945. At the time of the strike, he was a trustee and shop committeeman for the union and served as chairman of its Welfare Committee during the strike period. (Tr. 4380). At the time of his original hiring, a workman's compensation waiver containing the restriction "avoid excessive strenuous use of left arm" was accepted from him by the defendant; (PX-220(A),(B),(C),(D)); it noted that he had a residual atrophy of the left arm and right leg, an aftermath of poliomyelitis. His original job in 1945 was as an assembler and disassembler, (Tr. 4718-19) job code 15-4 labor grade 7, and he progressed through the years to the position of setup or leadman, labor grade #3, job code 131, in department 15, a job tantamount to a straw boss, so-called. On January 17, 1961, he accepted a job in labor grade 7, job code 152, department 15, but after a physical examination by the plant physician, it was determined that he could not safely meet the physical functional demands of the job. (PX-209(A),(B); Tr. 4721-22, 7336-38). The plaintiffs claim this was motivated by the defendant's continued animus, since Lyons previously had this physical condition when he was originally hired and that it had become no worse. (Tr. 7350-54). However, the physical demands of a set-up man were substantially less than the job he would have been called upon to perform in January 1961. (PX-209, PX-235(A-F); Tr. 7338). Lyons was not examined by his own doctor after the defendant's physician turned him down. The Court accepts the objective findings of the defendant's trained medical officer. The defendant's action in denying Lyons employment at that time did not establish the plaintiffs' claim that the defendant had avoided Lyons' recall during the contract period prior to January 1, 1961, because it was motivated by animus arising from his union activity.

A third union officer, Lasch, who was steward trustee and a picket captain was not recalled; and the plaintiffs point to the fact that he was the only man on the first shift

in his job code who did not get back during 1960. (Tr. 8007). He feels that because of his union activity and because he announced the commencement of the strike in his department and asked others to follow, the defendant retaliated by discriminating against him. His work was that of a tool and die maker "B," job code 436.1, labor grade 4 in experimental. While the plaintiffs do not contend that defendant departed from the technical terms of the contract in the order of recall (Tr. 8048), they asked the Court to infer animus and discrimination by the defendant against him, because the defendant claimed that no jobs were available when his seniority position was reached (Tr. 8009); and if no job was available, defendant should have offered him one in some other department. (Tr. 6530). The defendant did write to him January 27, 1961 asking him to reapply, but he declined. While the person involved would naturally have suspicion of animus, there is not sufficient evidence before the Court to find that it has been proven.

Having examined the exhibits relating to all the union officials referred to by both parties, and after weighing the plaintiffs' claims and suspicions with the countervailing evidence offered by the defendant, describing the status and treatment of all union officials during the settlement period and thereafter, the Court finds that the plaintiffs' evidence is insufficient to sustain their claimed inference, that the defendant discriminated against union officials.

CONCLUSION

In the light of the Court's findings, it is suggested that counsel confer and agree to stipulate to the identity of individual registered strikers on the preferred hiring list, who are affected by these findings. In those instances where agreement cannot be reached, a supplemental hearing will be held by the Court or a Master appointed by the Court, to ascertain the identity of such persons preparatory to

the assessment of provable damages. This stipulation should include the following factual data:

1. Vacancies caused by the termination of summer hires during the settlement period (except those summer hires employed before the commencement of the strike), which were filled from a source other than the preferred hiring list, at a time when senior registered strikers in the same seniority area and occupational group were still awaiting recall; together with the identity of those persons prejudiced thereby.

2. Vacancies which were filled by promotions within the same seniority area, where registered strikers on the preferred hiring list, senior to the promotee, were still awaiting recall; and the identity of persons prejudiced thereby.

3. Vacancies which were filled by the promotion of trainees into seniority areas in the bargaining unit, where senior registered strikers were still awaiting recall; and the identity of any strikers prejudiced by the retention of temporary trainees after the settlement agreements became effective.

4. The identity of those registered strikers who executed waivers to await recall to their former job, which was ultimately filled by the transfer of a less senior employee within the active complement.

5. Vacancies which were filled by transfer across occupational code and seniority area lines during the strike settlement period, where more senior registered strikers on the preferred hiring list were still awaiting recall.

The Court finds that except in these limited areas where it found specific contractual violations, the defendant exercised good faith in its overall performance of the Strike Settlement Agreements. To conclude otherwise, would re-

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quire multiple strained, speculative and unjustifiable inferences.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court pursuant to Rule 52(a), Fed. R. Civ. P.

Dated at Hartford, Connecticut, this 19th day of March, 1969.

/s/ T. EMMET CLARIE
T. Emmet Clarie
United States District Judge

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ADDENDUM TO MEMORANDUM OF DECISION

May 27, 1969

By stipulation of counsel in consolidated Civil Actions No. 9084 and No. 9085, dated May 27, 1969, approved and ordered by the Court as of said date, the original Memorandum of Decision is amended and clarified as follows:

"Prefix '73' trainees, i.e., 'short term trainees' were part of the bargaining unit (just as were Prefix '72' trainees) and accordingly the treatment of neither of these two groups of employees is in issue or need be discussed further (pp. — - —) in said Memorandum of Decision."

"In the section captioned 'Conclusion' (pp. — - —)—the fact that the contractual seniority groupings at Pratt & Whitney and those at Hamilton differed in that, at Pratt & Whitney, the groupings consisted of employees in noninterchangeable occupational codes within each seniority area, whereas, at Hamilton Standard, the groupings consisted of the employees in each of the seniority areas—occupational codes at Hamilton being of no particular significance with respect to seniority—and recall rights at Hamilton, therefore, being to jobs in the employee's pre-strike seniority area (of his pre-strike or lower paid labor grade) for which he had (demonstrated ability) as defined at page — of the Memorandum of Decision."

Amendment so ordered.

[Filed June 27, 1972]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 9084

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO, *Plaintiff*,

v.

UNITED AIRCRAFT CORPORATION, *Defendant*.

Civil Action No. 9085

LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO, *Plaintiff*,

v.

UNITED AIRCRAFT CORPORATION, *Defendant*.

Final Judgment

These consolidated civil actions came on for trial before the Court and the issues having been duly tried, and decisions thereon having been duly rendered, which shall constitute the findings and conclusions of the Court; and the stipulations of the parties identifying the beneficiaries and formalizing the details of recovery having been duly executed and approved by the Court, and it appearing that all said beneficiaries have been offered appropriate reinstatement, and the Court having duly considered the motions, affidavits, and memoranda and heard arguments of counsel on June 12, 1972, on the remaining questions of costs, including a request for the deduction of fifteen percent (15%) from the amount awarded each beneficiary for distribution pursuant to certain resolutions and retainer agreements on file with the Court; the effect of satisfaction of this judg-

ment upon other potential liability and the form of the judgment to be entered, it is

ORDERED, ADJUDGED AND DECREED:

1. That the defendant shall:

(a) Pay to either plaintiff Lodge 743 or to plaintiff Lodge 1746, as appropriate, for distribution by an officer of plaintiff Lodge who shall have been specially and adequately bonded and approved by the Court for this purpose, the amount (if any) set forth opposite the name of each beneficiary identified in the appendix hereto and described as "Net Monetary Damages" plus simple interest at the rate of six per cent (6%) per annum from March 20, 1969, to the date of such payment; except, however, fifteen per cent (15%) of the money allocated each beneficiary shall be deducted from each such amount and said sum shall be paid over separately to the plaintiff unions for the benefit of their retained counsel in this litigation, pursuant to retainer agreements on file with the Court and modified by oral stipulation of defendant's counsel at the hearing, June 12, 1972, which is to be reduced to writing;

(b) Pay to the State of Connecticut Unemployment Compensation Fund, as a reimbursement on account of each of said beneficiaries, the amount of money (if any) set forth in the Appendix opposite the name of each such beneficiary and described as "Repayment of Unemployment Compensation Fund;"

(c) Pay to the defendant's employees' pension fund, as the employee contribution by such beneficiary to such fund, the amount (if any) set forth in the Appendix opposite the name of each such beneficiary and described as "Striker's Contribution to Adjust Pension Rights;"

(d) Add to the rights of each of said beneficiaries the amount of yearly retirement income (if any) payable to said beneficiary under the defendant's retirement annuity

program set forth in the Appendix opposite each of their names and described as "Additional Yearly Retirement Income;" and

(e) Adjust the personnel records of each of said beneficiaries who is now employed by the defendant to reflect thereon additional periods of seniority (if any) set forth in the Appendix opposite each of their names.

2. That defendant shall, as of November 28, 1960, cause to be reinstated on behalf of beneficiary Peters (Item No. 70 of the Appendix hereto) the group life insurance policy which he had when he was last actively in the employment of defendant on June 7, 1960, so that his last named beneficiary on that policy, his wife, Kathleen Peters, will receive the benefits thereof which she would have received had Peters had such group life insurance policy and been in defendant's employ at defendant's Hamilton Standard Division in Department 113, Job Code 43, Grade 9, Propeller Process Worker - B, at the time of his death on June 8, 1966; and that defendant shall deduct from Peter's "Net Monetary Damages" the sum of \$117.73 which defendant shall pay (together with an equal amount to be paid by defendant) to the insurance carrier as premiums on such group life insurance policy.

3. That payment and receipt of money and/or other benefits under this judgment shall not constitute or operate as a settlement or waiver of any right to larger compensation or benefit which may be established on appeal in this case or on review of United Aircraft Corp., NLRB Cases No. 1-CA-3355, et al, but performance under this judgment shall be credited to defendant against any such obligation or liability.

4. That, except in the cases of the 72 beneficiaries identified in the Appendix hereto and to the extent provided for in paragraphs 1 and 2 above, and except insofar as the Court has declared and adjudicated the rights of the par-

ties as prayed, any and all claims against defendant made by the plaintiff unions on their own behalf, or on behalf of the 3,503 strikers identified in plaintiffs' more definite statement of its consolidated complaint herein, are hereby denied and the complaint herein is dismissed with respect to any and all such claims.

5. That plaintiffs shall recover from the defendant herein their legal taxable costs incurred in this litigation, to be taxed by the Clerk in accordance with the Rules of Court.

6. That jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may seem necessary or appropriate for the construction or carrying out of this Final Judgment, or for the enforcement of compliance therewith.

7. The findings of fact and conclusions of law set forth in the Court's Memorandum of Decision filed March 20, 1969, are incorporated herein by reference.

Dated at Hartford, Connecticut, this 16th day of June, 1972.

T. EMMET CLARIE
United States District Judge

APPENDIX

(A) STRIKERS PREJUDICED BY TRANSFERS, PROMOTIONS OR DEMOTIONS INTO JOBS VACATED BY "SUMMER" EMPLOYEES

Name and Clock No. of Striker	Net Monetary Damages	Repayment to Unemployment Compensation Fund	Striker's Contribution to Adjust Pension Rights	Additional Yearly Retirement Income	Additional Periods of Seniority
1. Roy, 118560	\$ 99.28	None	2.15	1.24	9/26/60-10/ 4/60
2. Supronowicz, 47201	2,875.00	\$1,125.00	None	None	None
3. Welch, 917	144.36	45.00	4.20	1.44 (retroactive to 3/1/68)	None
4. Cole, 4559	None	None	None	None	None

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(B) STRIKERS PREJUDICED BY PROMOTIONS

Name and Clock No. of Striker	Net Monetary Damages	Repayment to Unemployment Compensation Fund	Striker's Contribution to Adjust Pension Rights	Additional Yearly Retirement Income	Additional Periods of Seniority
5. Shaw, 44021	\$2,394.14	\$1,029.00	\$ 153.89	72.52	8/22/60- 2/ 5/61
6. Hammond, 12707	412.62	None	15.41	6.90	8/22/60- 9/ 2/60
7. Vaillancourt, 33534	1,239.40	None	65.23	30.37	8/29/60- 8/30/60
8. Arsenault, 116566	19.22	None	.42	0.23	9/ 5/60
9. Guerrier, 118256	None	None	None	None	None
10. Huntley, 23485	187.56	135.00	7.05	4.08	9/12/60-10/ 5/60
11. Weatherby, 127402	None	None	None	None	None
12. Patchell, 145661	508.97	315.00	None	None	11/28/60- 1/15/61
13. Wolf, 146826	6,000.00	None	None	None	None
14. Ruzala, 146999	1,250.33	310.00	None	None	None

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Name and Clock No. of Striker	Net Monetary Damages	Repayment to Unemployment Compensation Fund	Striker's Contribution to Adjust Pension Rights	Retirement Income Additional Yearly	Additional Periods of Seniority
15. Sawyer, 150263	\$1,038.27	\$ 210.00	None	None	11/28/60- 3/ 7/61
16. Blum, 150823	5,000.00	None	None	None	None
17. Bennett, 151278	1,958.53	None	None	None	None
18. Stanton, 151494	1,401.37	None	None	None	None
19. MacGregor, 20087	28,740.33	1,170.00	\$2,331.90	1,349.89	9/16/60-10/24/66
20. Hallberg, 20767	158.14	135.00	6.34	3.67	9/26/60-10/16/60
21. Dubay, 20396	1,070.00	180.00	None	None	9/26/60- 5/ 2/71
22. Nissopoulos, 22375	1,481.58	None	1,186.53	641.15	11/28/60- 3/ 2/61
23. Cuneo, 24586	6,910.00	90.00	None	None	None
24. Messier, 34990	817.74	None	5.02	2.78	8/15/60- 9/18/61
25. Mockus, 866	29,840.07	675.00	324.34	149.64	None
26. Palmer, 34424	28,760.80	836.00	403.20	479.66	11/ 7/60- 4/28/71
27. Sullivan, 35672	3,680.82	270.00	38.26	32.80	12/ 5/60- 1/16/61
28. Deslauriers, 26807	15,739.03	675.00	826.07	652.53	12/ 5/60- 5/ 2/71
29. Blain, 4914	19,100.00	900.00	None	None	None
30. Olivier, 27110	13,533.96	None	None	None	None
31. Hodges, 2447	4,920.74	931.00	241.10	123.56	8/15/60- 1/15/61
32. Pomaski, 2699	10,735.76	None	None	806.16	None
33. Sheehan, 9369	112.78	None	5.94	2.80	8/15/60- 8/21/60
34. Gubala, 24522	6,177.14	392.00	305.10	144.77	11/21/60- 1/15/61
35. Ridolfo, 23794	1,877.66	None	71.22	33.29	11/28/60- 1/13/61
36. LaChappell, 24551	800.04	None	None	None	11/28/60- 1/11/61
37. Grosvenor, 29151	2,000.00	None	None	None	None
38. Dickinson, 27043	3,254.45	732.00	1,255.82	696.74	8/22/60-12/11/61
39. Merchant, 31789	1,843.60	570.00	None	12.84	11/ 4/60- 1/11/61
40. Berriault, 23382	11,958.38	200.00	None	734.52	None
41. Guy, 67	1,820.53	None	None	28.92 (retroactive to 12/1/61)	None
42. Nims, 23049	17,381.36	1,118.00	1,248.00	1,054.30	9/19/60-11/ 2/66

Name and Clock No. of Striker	Net Monetary Damages	Repayment to Unemployment Compensation Fund	Striker's Contribution to Adjust Pension Rights	Additional Yearly Retirement Income	Additional Periods of Seniority
43. Pharmer, 18709	\$ 450.00	None	None	None	None
44. Roman, 20237	303.95	\$ 225.00	\$ 10.80	5.40 (retroactive to 5/1/69)	None
45. Pacocha, 22524	1,480.80	135.00	None	None	10/ 3/60-10/18/60
46. Furber, 19213	7,595.00	405.00	None	None	None
47. Falcon, 19565	1,436.56	None	75.62	35.49	9/ 5/60- 9/12-60
48. Kevetos, 5349	136.24	None	None	1.20 (retroactive to 5/1/68)	None
49. Niemczyk, 3385	502.92	None	21.38	10.49	8/15/60- 9/11/60

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(C) STRIKERS PREJUDICED BY TRANSFER OF
"DEPARTMENT 74 TRAINEES"

Name and Clock No. of Striker	Net Monetary Damages	Repayment to Unemployment Compensation Fund	Striker's Contribution to Adjust Pension Rights	Additional Yearly Retirement Income	Additional Periods of Seniority
50. Hill, 33428	\$1,317.18	\$ 530.00	None	None	None
51. Heck, 43196	4,469.88	732.00	\$ 698.12	730.46	10/17/60- 5/ 4/69

(D) STRIKERS PREJUDICED BY LATERAL TRANSFERS AND
DEMOTIONS FROM ONE SENIORITY GROUP TO ANOTHER

Name and Clock No. of Striker	Net Monetary Damages	Repayment to Unemployment Compensation Fund	Striker's Contribution to Adjust Pension Rights	Additional Yearly Retirement Income	Additional Periods of Seniority
52. La Voie, 118729	\$16,730.97	\$ 784.00	\$1,485.03	844.20 (beginning 12/1/72)	None
53. Coons, 18676	26.60	318.00	7.65	4.41	10/10/60-10/30/60
54. Brett, 146810	155.00	273.00	None	None	None
55. Noel, 69407	157.08	None	None	None	9/ 5/60- 9/15/60
56. Matchett, 45459	197.66	53.00	3.77	2.14	9/12/60- 9/29/60
57. Dubois, 87227	218.50	None	4.72	2.74	9/ 5/60- 9/18/60
58. Miller, 2085	2,496.47	None	103.53	51.44	8/29/60- 3/20/61
59. Cook, 71799	634.67	450.00	None	None	None
60. Didsbury, 92895	None	None	None	None	None
61. Moquin, 99822	292.88	None	None	None	None
62. Thomen, 117483	182.00	318.00	None	None	None
63. Gagnon, 119558	None	None	None	None	None
64. Brown, 120074	920.23	315.00	11.07	3.22 (retroactive to 2/1/68)	None
65. Stiles, 122576	285.82	None	None	None	None
66. Haley, 17331	2,266.30	1,464.00	None	28.44 (retroactive to 6/1/67)	None
67. Hughes, 118933	197.01	366.00	None	None	9/26/60-12/13/60
68. Scavotto, 23218	10,534.72	12.00	None	518.16	None
69. Fisher, 20682	4,774.07	585.00	None	35.16	None
70. Peters, 20411	8,280.00	720.00	None	None	None
71. Black, 20101	1,080.50	675.00	None	None	None
72. Rosa, 22809	6,330.00	1,170.00	None	None	None

205a

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of December, one thousand nine hundred and seventy-five.

72-1936, 72-1937, 72-2072

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiffs-Appellants-Appellees
v.

UNITED AIRCRAFT CORPORATION,
Defendant-Appellee-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of December, one thousand nine hundred and seventy-five.

Present:

WILLIAM H. TIMBERS,
LEONARD P. MOORE,

Circuit Judges

TOM C. CLARK

Associate Justice

Docket No. 72-1936

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Appellant

v.

UNITED AIRCRAFT CORPORATION,

Appellee

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-819

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners

v.

UNITED AIRCRAFT CORPORATION

**Order Extending Time to File Petition for
Writ of Certiorari**

UPON CONSIDERATION of the application of counsel for
petitioner(s),

IT IS ORDERED that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same is
hereby, extended to and including May 27, 1976.

/s/ THURGOOD MARSHALL
Thurgood Marshall
*Associate Justice of the Supreme
Court of the United States*

Dated this 19th day of March, 1976.

United Aircraft Corporation (Pratt and Whitney Division)
and Lodge #1746, International Association of Ma-
chinists, AFL-CIO

United Aircraft Corporation (Pratt and Whitney Division)
and Edward F. Rabowski

United Aircraft Corporation (Pratt and Whitney Divi-
sion-Connecticut Advanced Nuclear Engineering Lab-
oratory) and Lodge #700, International Association
of Machinists, AFL-CIO

United Aircraft Corporation (Hamilton Standard Divi-
sion) and Lodge #743, International Association of
Machinists, AFL-CIO

United Aircraft Corporation (Hamilton Standard Divi-
sion) and Francis J. Karcz, and William A. Grant.
Cases 1-CA-3355 (1-3), 1-CA-3357, 1-CA-3359, 1-CA-
3528, 1-CA-3532, 1-CA-4201, 1-CA-4492, 1-CA-3396,
1-CA-4802, 1-CA-3358, 1-CA-3372, 1-CA-3435, 1-CA-
3571, 1-CA-3634, 1-CA-4202, 1-CA-4491, 1-CA-3434, and
1-CA-3900

July 30, 1971

Decision and Order

On July 25, 1969, Trial Examiner Lee J. Best issued his
Decision in the above-entitled proceedings, finding that
Respondent had engaged in certain unfair labor practices
alleged in the complaint and had not engaged in others, and
recommending that it cease and desist from the unfair
labor practices found and take certain affirmative action,
all as set forth in the attached Trial Examiner's Decision.
Thereafter, the General Counsel, Charging Parties, and
Respondent filed exceptions to the Trial Examiner's De-

cision and supporting briefs;¹ General Counsel and Charging Parties also filed reply briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that, while some of the rulings may have been in error, they were not prejudicial. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in these cases,² and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions and modifications indicated hereinafter.³

1. The General Counsel and the Charging Parties complain that the Trial Examiner was biased and prejudiced, and request the Board to make *de novo* resolutions of the issues, at least where the Trial Examiner's findings are adverse to them. The adversaries blame each other, and the General Counsel and the Charging Parties also blame the Trial Examiner for the unusual length of this litigation.

¹ Respondent has filed a "Motion to Strike Exceptions and Briefs in Support of Such Exceptions filed by Charging Parties and General Counsel" on the ground that they do not comply with Sec. 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended. General Counsel and the Charging Parties filed opposition thereto. We find that the exceptions and briefs objected to are in substantial compliance with the Board's Rules and therefore deny Respondent's motion. *Stop & Shop, Inc.*, 161 NLRB 75, 76.

² The Charging Parties have requested oral argument. The request is denied as the exceptions and briefs adequately set forth the positions and arguments of the parties.

³ Subsequent to the issuance of the Trial Examiner's Decision, the General Counsel filed two motions to reopen the record to receive further evidence bearing on the issues. The additional proffered evidence appears to relate to the issue of compliance. We therefore deny the motion at this time without prejudice to the General Counsel's right to renew his motion at the compliance stage of this proceeding.

The trial of these cases has not been a model of how litigation should be conducted, to put it charitably. The trial was accompanied at almost every stage by lack of cooperation, bickering, and discourtesy between counsel, and between counsel for the General Counsel and the Charging Parties and the Trial Examiner. There is fault enough for everybody.⁴ It would be profitless at this date to try to fix the blame for the protracted delay in disposing of these cases at the trial stage; we shall not attempt to do so. As to the claim of bias and prejudice on the part of the Trial Examiner, we reject it. Most of the factual predicates for the Trial Examiner's conclusions are not in serious dispute. Except as indicated hereinafter, we agree with the inferences and conclusions drawn by the Trial Examiner from these facts. The principal evidence offered to support the prejudice argument is that in adjudicating the independent violations of Section 8(a)(1), the Trial Examiner on the basis of demeanor "discredited *every single one* of General Counsel's witnesses—unless their testimony was utterly unchallenged or uncontradicted by respondent." (Charging Parties' exceptions, p. 4.) However, total rejection of the credibility of the witnesses for one party and crediting of witnesses for another "cannot of itself impugn the integrity or competence of a trier of fact."⁵ The credited evidence does not carry "its own death wound," and the clear preponderance of all the relevant evidence does not establish that the Trial Examiner's credibility resolutions were incorrect.⁶ We therefore adopt them.

2. We find, in agreement with the Trial Examiner, that Respondent interfered with, restrained, and coerced its em-

⁴ *United Aircraft Corporation v. McCulloch*, 365 F.2d 960 (C.A. D.C.); *Hoban v. United Aircraft Corporation*, 264 F.Supp. 645 (D.C. Conn.).

⁵ *N.L.R.B. v. Pittsburgh S.S. Company*, 337 U.S. 656, 659.

⁶ *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd. 188 F.2d 362 (C.A. 3).

employees in violation of Section 8(a)(1) of the Act because of conduct engaged in by Supervisors Leonard Welles, William Smith, Robert Sweeney, and Charles Lindsay. We further find, contrary to the Trial Examiner, that Supervisor Charles Hurd's statement to Mrs. Davis, 2 days before the strike, in the presence of two other employees, that "A lot of people are going to get hurt and a lot of people won't be coming back," if they went out on strike, constituted a threat of economic reprisal in violation of the Act. Respondent contends that, in view of the overall employee complement, the Board should consider the foregoing incidents as isolated and not issue a cease-and-desist order. We find no merit in this contention. In our opinion, the number of incidents found unlawful herein, which consisted of threats of economic reprisal, interrogation creating the impression of surveillance of employees' union activities, and offers of benefits conditioned upon abandoning the strike, warrants the issuance of a remedial order.

3. In addition to the General Counsel's and Charging Parties' disagreement with the Trial Examiner's credibility resolutions involved in his discussion of the alleged independent violations of Section 8(a)(1), they argue that he did not consider certain other testimony relating to the 8(a)(1) violations. In this regard, after numerous amendments to the initial complaint were granted by the Trial Examiner, the General Counsel filed a consolidated amended complaint which included "all amendments made and motions granted by the Trial Examiner up to and including March 19, 1965," the date on which the General Counsel rested his presentation of the case. Approximately 60 named supervisors are alleged in the final amended complaint to have engaged in 8(a)(1) violations. However, testimony adduced by the General Counsel attributed unlawful conduct only to 40 of these supervisors, all of which testimony is duly discussed in the Trial Examiner's Decision, except for certain omissions noted below. In view of the General Counsel's concession on the record that if

a supervisor is "not alleged as committing a specific violation of 8(a)(1), obviously [the Trial Examiner] cannot find it as a matter of law," the Trial Examiner dismissed the complaint as to 20 of the supervisors. He did not discuss testimony concerning conduct of supervisors not named in the last amended complaint as having committed 8(a)(1) violations. This testimony was introduced to support the allegation of antiunion motivation in the failure to reemploy all strikers, and not as evidence of independent 8(a)(1) conduct. In view of the concession of the General Counsel, the Trial Examiner was justified in limiting his consideration of 8(a)(1) violations to the conduct specified as such in the amended complaint.

4. As the result of the misspelling of the names of several supervisors in the amended complaint, the Trial Examiner dismissed allegations of 8(a)(1) violations as to them, on the ground that he could find no evidence in the record concerning them. Thus, he dismissed allegations involving Supervisors Willis, Postum, and Slaffenhoffer. The correct names of these three supervisors are Welles, Postal, and Schladenhaufen, respectively. The Trial Examiner did discuss the conduct of these three individuals under their correct names. The Trial Examiner also dismissed allegations involving Supervisor Hurd on the same ground—lack of evidence in the record. This seems to have been an oversight on the Trial Examiner's part, as he did discuss Hurd's conduct and disposed of it on the merits. The Trial Examiner's Decision is amended accordingly.

The Trial Examiner also failed to discuss the alleged unlawful conduct of Supervisor Lawrence, who is named in the amended complaint as having violated Section 8(a)(1). According to the uncontradicted testimony of employee Patricia Hoar, near the end of May 1960, which was before the strike started, Lawrence said to her that "he should like to see me think for myself and not listen to the union but listen to what is best for myself . . . that my loyalty was

to the company since they were the ones paying me. I told him that money didn't buy loyalty, that you just did the best work you could." We find that this statement by Lawrence was not violative of Section 8(a)(1).

5. We agree with the Trial Examiner's conclusion that no finding of an 8(a)(1) violation should be based upon the alleged statements made to several striking employees by Supervisor Pelletier inviting strikers to return to work so that he could "terminate" them. Pelletier died in 1962,⁷ before the initial complaint was issued in 1963 and before testimony of the General Counsel's witnesses. In agreeing with the Trial Examiner's conclusion, however, we do not adopt his principal rationale therefor. He stated that the principal reason for his finding of no violation was the rule of evidence that testimony concerning conversations and transactions with a dead man are not admissible. The Board's rule in this regard is not as stated by the Trial Examiner. The Board will consider such evidence, but will subject it to the closest scrutiny before deciding what weight should be given to it.⁸ As an alternate ground for not crediting the testimony of the employee witnesses as to what Pelletier said to them, the Trial Examiner characterized such testimony as "suspect" and "ambiguous." We have the same suspicion as to this testimony. During the strike, the Respondent continued to operate and welcomed the return of strikers to their jobs. It seems improbable that a foreman would invite strikers to cross the picket line and return to work so that he could terminate them. If Pelletier wanted to terminate them, he could have done so without inviting them to cross the picket line. Accordingly, we adopt the Trial Examiner's finding that the Respondent

⁷ The Trial Examiner's Decision states that Pelletier died in 1966. This is an error; the correct date is as stated above.

⁸ *West Texas Utilities Company, Inc.*, 94 NLRB 1638, 1639, *enfd.* 195 F.2d 519 (C.A. 5).

did not violate Section 8(a)(1) by the alleged statements of Pelletier.

6. The Trial Examiner found that Personnel Manager Wilhide's statement to employee Desriusseau on the picket line, "Come on in. It's your last chance," was not violative of Section 8(a)(1) and that, in any event, Wilhide was not a supervisor. We agree that the statement was not unlawful, but we find that Wilhide was a supervisor.

7. The Trial Examiner found that Respondent had not violated Section 8(a)(1) by threatening to bring a civil suit against the Charging Parties as a result of certain union conduct during the 1960 strike unless the Unions withdrew their unfair labor practice charges, or by actually bringing such suit because the Unions had refused to withdraw their charges.

Respondent filed suits against the Charging Parties in Connecticut Superior Court seeking damages for alleged tortious acts committed by the Unions' members during the course of the 1960 strike and secured judgments against the Unions in excess of \$1 million.⁹ In the *Clyde Taylor* case,¹⁰ the Board held that, while "the making of a threat by an employer to resort to the civil courts as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act" was a violation of Section 8(a)(1), an actual suit was not similarly unlawful. In justification of the latter position the Board majority reasoned that "the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in

⁹ *United Aircraft Corp. v. IAM*, 68 LRRM 2488, 70 LRRM 2577 (Conn. Superior Ct. Hartford County, Nos. 133884 and 133885). The Connecticut Supreme Court affirmed the Superior Court's finding of liability but directed a new trial with respect to the amount of compensatory damages. *United Aircraft Corp. v. Machinists*, issued April 27, 1971.

¹⁰ *Clyde Taylor Company*, 127 NLRB 103.

court, rather than condemn the exercise of such right as an unfair labor practice."¹¹ Since the *Taylor* case, the Board has consistently held that the filing of a civil suit cannot be found to be an unfair labor practice.¹² Moreover, Respondent's threat to file such a suit unless an overall settlement agreement was reached was not the kind of "tactic calculated to restrain employees in the exercise of rights guaranteed by the Act" envisaged by *Taylor*. Respondent believed, as events proved correctly, that it had good grounds for a civil damage suit against the Charging Parties which it was willing to forgo if the Charging Parties in turn would withdraw their unfair labor practice charges. Under such circumstances, a threat to proceed with the civil suit cannot be considered as of a "harassing nature." Rather, it appears to be part of a good-faith attempt to negotiate a settlement of the numerous claims arising out of the bitter 1960 strike, with each party giving up its claims against the other.¹³ We find nothing unlawful in such a proposal.

8. The Trial Examiner found that during the period from the termination of the strike to January 1, 1967, except in the categories of transfers and promotions, Re-

¹¹ *Id.* at 109. In taking this position, the Board majority overruled *W. T. Carter and Brother*, 90 NLRB 2020, and adopted the view expressed by former Chairman Herzog in his dissent in that case.

¹² *Smith Steel Workers*, 174 NLRB No. 41, enfd. in relevant part *sub nom. Smith Steel Workers v. A. O. Smith Corporation*, 420 F.2d 9 (C.A. 7); *G. C. Murphy Company*, 171 NLRB No. 45; *DC International, Inc.*, 162 NLRB 1383, 1394; *Fashion Fair Inc.*, 159 NLRB 1435, 1449; *Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America*, 145 NLRB 1097, 1121.

¹³ In the Connecticut suit, the court found that Respondent did not "use these lawsuits for bargaining purposes to induce the defendants to withdraw their claims in their action in the United States District Court." 70 LRRM 2577, 2580.

spondent did not discriminate against strikers in the process of returning to full production. In so concluding, the Trial Examiner adopted the findings of United States District Judge Clarie in the Section 301 suit initiated by the Charging Parties against Respondent.¹⁴ The General Counsel and the Charging Parties have excepted to virtually all the findings of the Trial Examiner relating to this issue, including the findings of Judge Clarie in the 301 suit, which were adopted by the Trial Examiner. We find no merit in these exceptions.

The General Counsel and the Charging Parties introduced the record in the 301 suit as an exhibit in the present case to prove discrimination. Indeed, the evidence as to discrimination in this case consists of little more than the record in the 301 suit. We have reviewed the record and exhibits in that case in the course of our review of the Trial Examiner's Decision. We concur in the Trial Examiner's characterization of Judge Clarie's opinion as being "a masterly analysis of all the facts and circumstances of the situation."

Following extensive pretrial discovery, the 301 suit was tried before Judge Clarie during an extended recess of the hearing before the Trial Examiner. When the hearing was resumed before the Trial Examiner, the 301 record was, by agreement of the parties, made part of the record in this case. At that time Judge Clarie had not yet rendered his decision in the 301 suit. Judge Clarie found that while the Plaintiffs (Charging Parties here) had made out a *prima facie* case of breach of the Strike Settlement Agreements, the Defendant (Respondent here) "assumed its burden of going forward and advanced proof which satisfied the Court, that it had acted in good faith and was motivated by legitimate and substantial business justification in the performance of its obligations under the Strike Settlement

¹⁴ *Lodge 743, IAM v. United Aircraft Corp.*, 299 F. Supp. 877 (D.C. Conn.).

Agreements." In his decision, Judge Clarie set forth at length the arguments of the Plaintiffs, especially regarding the central theory of complement depression, and followed this by an equally extended analysis of the Defendant's evidence in rebuttal. Having relied mainly on the 301 record to support the case for discrimination the Charging Parties now find it necessary to except not only to the adverse findings of the Trial Examiner, but also to those of the similar adverse findings of Judge Clarie. We adopt the findings of the Trial Examiner as well as those of Judge Clarie. In so doing, we find it unnecessary to answer specifically all the exceptions of the General Counsel and the Charging Parties. However, some brief comments are appropriate.

In their exceptions the General Counsel and the Charging Parties contend that the Respondent depressed the complement of employees during the life of the settlement agreements in order to undermine the Union. They contend, in effect, that, if the Respondent had returned all strikers to work at the conclusion of the strike, normal production could have been resumed immediately. This contention is without merit.

As the record reveals, and Judge Clarie found, the Respondent had taken numerous precautions in anticipation of the strike in order to ensure that it could continue production, including the stockpiling of some parts and subcontracting for the manufacture of other parts. As a result, an immediate return to normal production at the conclusion of the strike was impossible, because of the imbalance in the flow of production. If the Respondent had returned all strikers to work immediately, either the imbalance would have been perpetuated, or there would have been nothing for many of the employees to do while other employees manufactured needed parts. The Respondent was not required by the Act to follow such a course of action in order to reinstate economic strikers. It was required to recall the strikers as jobs became available, and this the Respondent did, with certain exceptions noted, *infra*, where employees

were transferred or promoted. The evidence of the General Counsel and the Charging Parties regarding the depression of the employee complement, provided at most a *prima facie* showing of a violation, which the Respondent answered by evidence of the production imbalance. The contention of the Charging Parties that the Respondent was required to show which parts were in short supply, and how production was affected, etc., is incorrect. The Respondent answered the *prima facie* case of the Charging Parties and the General Counsel, and it then became their burden to overcome this answer. This the General Counsel and the Charging Parties failed to do.

Based upon uncontradicted evidence before him, the Trial Examiner also concurred in the ruling of Judge Clarie in respect to the settlement agreement violations by the Respondent regarding transfers and promotions of junior employees, and found this conduct also constituted violations of Section 8(a)(3). He suggested either accepting the court's identification of those discriminatees or holding a later hearing for that purpose. In agreeing the Trial Examiner's finding of violations of Section 8(a)(3), we also find that it would avoid duplication of remedies if we adopted the identification of those discriminatees by the court.

9. In June 1960, the Charging Parties began an economic strike against Respondent. As found by the Trial Examiner, the strike was "accompanied by extreme violence, disorderly conduct, and mass picketing" With the aid of Governor Ribicoff of Connecticut, high officials of the IAM, including its General Counsel, negotiated with Respondent terms for the settlement of the issues arising out of the strike. The settlement comprised three parts: (1) procedure for the recall of strikers to work; (2) terms of a new collective-bargaining contract; and (3) submission to arbitration of the cases of 50 strikers whose right to recall was challenged by Respondent on the ground that they had engaged in serious misconduct during the strike. The terms

of settlement were approved by the memberships of Lodges 743 and 1746, and thereafter were embodied in three separate documents and signed by authorized representatives of all parties.

The recall agreement¹⁵ provided that strikers who wished to return to work would register for such return in a 3-day period and thereafter would be returned to work in the following manner: (a) if the striker's prestrike job was available, he would be returned to that job; (b) if that job was not available, the striker would be recalled to other available jobs in his occupational group and seniority area in accordance with seniority under the newly signed collective-bargaining contract;¹⁶ and (c) if no job was available for the striker under (a) and (b) above, he would be placed on a preferred hiring list and would be recalled to job openings in his occupational group and seniority area which developed at any time prior to January 1, 1961. It was understood that the preferred employment status of a striker who was not recalled to work by December 31, 1960, would expire on that date.¹⁷

¹⁵ The recall agreement is denominated "STRIKE SETTLEMENT AGREEMENT," but the term "recall agreement" is more descriptive of its contents.

¹⁶ This is the provision in the recall agreement between Lodge 1746 and Respondent covering the East Hartford and Manchester, Connecticut, plants of the Pratt and Whitney Aircraft Division. In the recall agreement between Lodge 743 and Respondent pertaining to the Hamilton Standard Division this provision was somewhat different. The difference is not relevant to the issue under discussion.

¹⁷ Our dissenting colleagues dispute the statement that, according to the understanding of the parties as to the meaning of the recall agreement, the preferred employment status of strikers on the preferred list was to expire on December 31, 1960. In the dissenting members' view of the agreement "all strikers who had registered for reinstatement would be recalled until the Respondent reached its prestrike complement, which occurred on April 30, 1961."

Not only is this view unsupported by the language of the recall

The Trial Examiner found, as did Judge Clarie in the 301 suit,¹⁸ that Respondent administered the recall agreement in good faith, except as to minor infringements with respect to certain transfers and promotions. He also found that the General Counsel had not proved that Respondent had discriminated against strikers either on an individual or group basis prior to December 31, 1960. However, he did find, on the authority of the *Laidlaw* decision,¹⁹ that

agreement, it is contrary to the parties' understanding of the meaning of the preferred hiring list, as found by Judge Clarie in the 301 suit. *Lodge 743, IAM v. United Aircraft Corp., supra* at 883, 889, 908, 926. Thus, as Judge Clarie described the events leading up to execution of the settlement agreement:

At the August 6, 1960 meeting with Thurer, Main and Fraser, when the local union officers were reviewing what had been agreed to the previous day in New York. Burke advised them that after December 31, 1960, the procedure applicable to the preferred list would not be followed; (TR 3006) this point was clearly understood and agreed to before the union called the membership ratification meeting. (*Supra* at 926.)

Elsewhere, Judge Clarie concluded (at 908) that:

The defendant did not even promise to restore all registered strikers prior to January 1, 1961. On the contrary, it was mutually contemplated that all registered strikers would not be restored, because the agreement established the cutoff date of December 31, 1960, for those entitled to receive vacation pay; and it established that date as a limitation on contractual preferential hiring rights.

The point was so obvious that, as Judge Clarie observed, the Union did not even contend that the recall agreement gave registered strikers any rights after January 1, 1961. (*Supra* at 889). We see no justification for reaching a different interpretation of the parties' agreement in this proceeding, an interpretation not urged by the Union in the contract suit, when such a claim would have been to its obvious advantage.

¹⁸ *Lodge 743, International Association of Machinists, AFL-CIO v. United Aircraft Corporation*, 299 F. Supp. 877 (D.C. Conn.).

¹⁹ *The Laidlaw Corp.*, 171 NLRB No. 175, enf'd. 414 F.2d 99 (C.A. 7), cert. denied 397 U.S. 920.

Respondent had, on and after January 1, 1961, discriminated against employees on the preferred list by abandoning that list and hiring strikers only as new employees without credit for the seniority and other privileges they previously had enjoyed. Respondent has excepted to this finding of discrimination. We find merit in the exception.

In *Laidlaw*, the Board held, relying on the principles enunciated by the Supreme Court in the *Fleetwood Trailer* case,²⁰ that after the termination of a strike economic strikers retain their status as employees and may not be terminated even though no jobs are available for them at the time they make application for reinstatement, unless they have found regular and substantially equivalent employment elsewhere or the employer can show legitimate and substantial business justification for such termination or failure to reemploy. However, in *Fleetwood*, the Supreme Court specifically reserved the question of whether a union could waive the right of strikers to reinstatement ahead of new applicants.²¹

The Board is charged with the exclusive responsibility of vindicating the public policy as defined by Section 1 of the Act.²² It follows that the Board is not bound by any private

²⁰ *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375.

²¹ *Id.* at fn. 8, where the Court said:

The respondent contends that the Union agreed to a non-preferential hiring list and thereby waived the rights of the strikers to reinstatement ahead of the new applicants. The Board found that the Union, having lost the strike, merely "bowed to the [respondent's] decision." The Court of Appeals did not rule on this point or on the effect, if any, that its resolution might have upon the outcome of this case. Upon remand, the issue will be open for such consideration as may be appropriate.

²² Sec. 1 provides:

It is hereby declared to be the policy of the United States to eliminate the causes of certain obstructions to the free

adjustment of rights guaranteed by the Act.²³ But it does not also follow that because the Board is not required to place its imprimatur upon private adjustments of statutory rights, it may not in the exercise of its discretion accept a particular private adjustment as conforming to the policy of the Act and therefore deserving of approval by the Board. For example, the Board has held that it will recognize a union waiver of certain statutory rights, including the Section 13 right to strike.²⁴ The Board has gone even further and has decided that in appropriate cases, it will defer to the parties' arbitration agreement and refrain from adjudicating unfair labor practices even though the statute states explicitly that the Board's power to prevent any person from engaging in unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." (Section 10(1).) All this is founded upon the interest of encouraging the "practice and procedure of collective bargaining."²⁵

flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

²³ *International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO v. N.L.R.B.*, 328 F.2d 723 (C.A. 3); *N.L.R.B. v. Threads, Inc.*, 308 F.2d 1 (C.A. 4); *N.L.R.B. v. E.A. Laboratories, Inc.*, 188 F.2d 885 (C.A. 2); *Gale Products, Div. of Outboard Marine Corp.*, 142 NLRB 1246, enforcement denied 337 F.2d 390 (C.A. 7).

²⁴ See, e.g., *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95; *International News Service Division of the Hearst Corporation*, 113 NLRB 1067; *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098; *Shell Oil Company*, 93 NLRB 161, 164.

²⁵ *International Harvester Company*, 138 NLRB 923, enf'd. *sub nom. Ramsey v. N.L.R.B.*, 327 F.2d 784 (C.A. 7), cert. denied 377

In *Fleetwood* itself, the Supreme Court acknowledged that an economic striker's right to reinstatement following a strike is not absolute. If, for example, the employer can show that his refusal to reinstate a striker was due to "legitimate and substantial business justifications," his refusal to reinstate is not an unfair labor practice. And the Court also noted that it is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in the light of the Act and its policy.²⁶

The policy of the Act is not only to protect the Section 7 rights of employees, but also to encourage the "practice and procedure of collective bargaining" as a means of resolving labor disputes.²⁷ This encouragement of the procedure of collective bargaining extends to the negotiation of strike settlement agreements.²⁸ In holding that strike settlement agreements are enforceable under Sections 301(a) of the Act, although not collective-bargaining contracts, the Supreme Court has said (369 U.S. at 27):

If this kind of strike settlement agreement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the

U.S. 1003; *Spielberg Manufacturing Company*, 112 NLRB 1080. Member Jenkins does not rely on *International Harvester* here.

²⁶ *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 378; *The Laidlaw Corp.*, 171 NLRB No. 175.

²⁷ "But the rights recognized in § 7 may be affected by a valid collective bargaining agreement; to deny this would be to ignore not only the exclusive-representation principle of § 9(a) but the whole policy of Congress, set forth in § 1, of 'encouraging the practice and procedure of collective bargaining' and relying on such agreements for the maintenance of industrial peace." *N.L.R.B. v. Lundy Manufacturing Corp.*, 316 F.2d 921, 925 (C.A. 2).

²⁸ *Retail Clerks, International Association, Local Unions Nos. 128 and 633 v. Lion Dry Goods*, 369 U.S. 17.

labor policy objective of minimizing disruption of interstate commerce would be made more difficult.

There is therefore a public policy embodied in the Act which favors enforcement of voluntary agreements settling strikes.

The strike in this case was caused by disagreement over terms of a new collective-bargaining agreement. As the strike continued, settlement was complicated by the violence which accompanied the strike and by Respondent's attempts to continue operating with the aid of various expedients, including the hiring of new employees, transfers, promotions, overtime, and subcontracting. Respondent insisted, as it had a lawful right to do, that it would not reemploy strikers who had engaged in serious misconduct during the strike, and that it would not discharge striker replacements to make way for the return of strikers. Eventually, the points of disagreement between the parties were resolved by the strike settlement agreements described and the strike terminated.

In considering whether to modify Respondent's obligation as defined in the recall agreement in view of *Laidlaw*, we have considered the following factors. The recall agreement was one of three agreements negotiated by the parties in order to settle the issues arising from the strike. The strike was an economic strike. On behalf of the employees and the Unions, the agreements were negotiated by top officials of the Charging Parties who were experienced, competent, and knowledgeable. In order to reach agreement on disputed issues, Respondent made concessions which it might not have been willing to make if it knew that the Charging Parties would repudiate part of the recall agreement. The Charging Parties have accepted the benefits of the agreements; in fact, they have sued Respondent for breach of the recall agreement. The recall agreement

was entered into by Respondent in good faith;²⁹ it has also been performed in good faith by Respondent.³⁰ The recall agreement did not represent an attempt by Respondent to undermine the Union. By contemporaneously signing a new collective-bargaining contract with the Unions, Respondent guaranteed the continued representative status of the Unions for the life of the new contract without regard to the number of strikers who might not be reinstated. Moreover, *Laidlaw* was not decided until 1968. At the time the recall agreement was signed in 1960, the prevalent rule could reasonably have been regarded as having been that an economic striker's right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list.³¹ Thus in agreeing to give strikers for whom jobs were

²⁹ Judge Clarie found (299 F. Sup. at 908):

[I]t was mutually contemplated that all registered strikers would not be restored, because that agreement established the cut off date of December 31, 1960, for those entitled to receive vacation pay; and it established that date as a limitation on contractual preferential hiring rights.

³⁰ Judge Clarie found (299 F. Supp. at 912):

The Court finds after considering the totality of the circumstances, that the plaintiffs have failed to prove their allegations that the defendant . . . deliberately and in bad faith depressed the bargaining unit during the life of the Settlement Agreements through December 31, 1960 or that it failed to exercise good faith in the performance of the Strike Settlement Agreements to avoid its contractual obligations. While the plaintiffs placed this question in issue by a prima facie showing, the defendant assumed its burden of going forward and advanced proof which satisfied the Court, that it had acted in good faith and was motivated by legitimate and substantial business justification in the performance of its obligations under the Strike Settlement Agreements.

³¹ *Brown and Root, Inc.*, 132 NLRB 486 (1961), enfd. 311 F.2d 447 (C.A. 8); *Atlas Storage Division*, 112 NLRB 1175, 1180 (1955), enfd. sub nom. *Chauffeurs, Teamsters, and Helpers "General"*

not immediately available preferred hiring status for approximately 4½ months after termination of the strike,

Local No. 200 AFL, 223 F.2d 233 (C.A. 7); *Bartlett-Collins Company*, 110 NLRB 395, 397-398 (1954), enfd. sub nom. *American Flint Glass Workers' Union v. N.L.R.B.*, 230 F.2d 212 (C.A.D.C.), cert. denied 351 U.S. 988. These cases were specifically overruled in *Laidlaw*. The Charging Parties argue in their reply brief that Respondent is wrong in stating that the rule in 1960 was that if an economic striker was replaced or if his job was not available at the time he made application for reinstatement, the employer could terminate such employee and its only obligation thereafter to such employee was not to discriminate against him as an applicant for new employment. That this was substantially the holding in the above-cited cases is a tenable conclusion from the fact that in *Laidlaw* they were overruled to the extent inconsistent with what the Charging Parties now argue was the rule then. Moreover, there was specific precedent for the validity of the recall agreement in another case decided in 1958—*Wooster Division of Borg-Warner Corporation*, 121 NLRB 1492, 1495. In that case, the union and the employer executed an agreement at the time a strike was settled which provided that a "specified number of available jobs were to be offered [to strikers] on the basis of seniority, first, to certain named employees whose jobs had not been filled or for whom there were jobs. As for those who were not so reinstated, the agreement provided that they would be offered 'work' as jobs became available. This preferential hiring, however, was not to extend beyond July 31, 1953 [less than 3 months after the date of execution of the agreement], after which time reemployment of former strikers would apparently be as new employees."

Of the validity of this agreement, the Board said:

In its original decision, the Board found that the strikers were economic strikers. As such, they were entitled to reinstatement unless they had been replaced or their jobs had been eliminated. As the agreement conformed with Board policies, the Board saw no reason to disturb the parties' settlement agreement. [113 NLRB 1288, 1296.] However, as we now find on remand that the strikers were unfair labor practice strikers, this agreement is in derogation of the strikers' rights and contravenes Board policies.

As the strike in the instant case was an economic rather than an unfair labor practice strike, we find it unnecessary to pass on the effect of a recall agreement on the rights of unfair labor practice strikers, and we do not do so.

Respondent gave them reinstatement rights which exceeded the requirements of the law as it was then understood.

If, as the Supreme Court has held, an employer can unilaterally terminate the reinstatement rights of economic strikers for legitimate and substantial business reasons, it would seem that such rights should also be terminable by agreement between the employer and the bargaining representative of the strikers. They are in the most favored position to know the business needs of the employer and the prospects of substantially equivalent employment elsewhere. A union may also by agreement obtain other benefits for employees in return for a concession as to a reinstatement cutoff date. So long, therefore, as the period fixed by agreement for the reinstatement of economic strikers is not unreasonably short, is not intended to be discriminatory, or misused by either party with the object of accomplishing a discriminatory objective, was not insisted upon by the employer in order to undermine the status of the bargaining representative, and was the result of good-faith collective bargaining, the Board ought to accept the agreement of the parties as effectuating the policies of the Act which, as we have previously stated, includes as a principal objective encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes.

In the present case, the defined reinstatement period was one term in a series of agreements settling many issues arising out of a difficult strike. The agreements reached resulted from good-faith bargaining, with concessions made by both parties. The Charging Parties and the employees have received the benefits of other terms of the settlement agreements and do not propose to surrender these benefits. Finally, the economic strikers were given employment preference rights for 4½ months, a not unreasonably short period. In these circumstances, we believe that it will best effectuate the policies of the Act to adopt the agreement of the parties as determining the reinstatement rights of

the economic strikers. Accordingly, we find, contrary to the Trial Examiner, that Respondent did not discriminate against such strikers in violation of Section 8(a)(3) and (1) of the Act by terminating their employment preference rights as of December 31, 1960, and thereafter treating them as if they were new applicants for employment.

10. In agreement with the Trial Examiner, and for the reasons stated by him, we deem the arbitration awards dispositive of the reinstatement rights of those strikers whose cases were by agreement of the Unions and Respondent submitted to arbitration."

11. Although we are in general agreement with the Trial Examiner's findings and recommendations with regard to the 8(a)(5) allegations of the complaint and are in the main adopting them, we deem it necessary to make certain clarifications, modifications, and additions to those findings.

Thus, we note that the Trial Examiner correctly found that the allegations of the complaint with respect to certain bargaining positions taken by the Respondent in the negotiations prior to the strike in the area of steward representation, recommendation of Respondent's contractual offer to the rank-and-file union membership, and management prerogative as to the removal of work, personnel and trainees from the unit, were barred by Section 10(b) of the Act since such proposals were made and the discussions thereon occurred prior to May 21, 1960, more than 6 months prior to the filing of the initial unfair labor practice charges. In this connection, we further find that, while these subjects may again have been referred to subsequent to May 21, 1960, in the negotiations leading up to the Strike Settlement Agreement, the evidence in any event is insufficient to establish that Respondent insisted on the subjects in dispute to point of impasse.

" See *Lodge 743, International Association of Machinists, AFL-CIO v. United Aircraft Corporation*, 337 F.2d 5, 11 (C.A. 2), cert. denied 380 U.S. 938.

With respect to the subject of steward representation, the evidence established that on several occasions Respondent's foremen refused the request of individual employees for the immediate services of a union steward when a dispute arose over such issues as overtime, assignment of work, and absences. In most cases, however, the affected employees did, shortly thereafter, on their own or through the medium of their respective supervisors, achieve steward representation prior to any disciplinary or other adverse action. In other instances, where the foreman determined that his action with respect to the employee involved did not constitute a violation of the existing contract, the employee, in accordance with the contract in effect, subjected his complaint to the grievance procedure. In these circumstances, we deem the evidence insufficient to warrant a finding of violation of Section 8(a)(5).³³

The record further reveals that in September 1963, Respondent determined that five employees in the blueprint crib had been duplicating work performed in other departments and that a layoff was in order. Rather than lay off any of the five employees who had declined offers of other jobs in the bargaining unit, Respondent unilaterally assigned the affected employees the additional duties of key-punch operator, a salaried position, which resulted in their removal from the unit. Despite the absence of complaint from the affected employees, the Union, upon discovering Respondent's action, filed a third-step grievance which it later dropped. The 1962 collective-bargaining agreement then in effect gave Respondent the sole right and responsibility for directing operations and for determining the assignment of work to employees and other persons. The contract also contained a union waiver clause applicable to any further collective bargaining with respect to working conditions, "except as may be dealt with as a grievance

³³ See *Chevron Oil Company*, 168 NLRB 574; *Jacobs-Pearson Ford, Inc.*, 172 NLRB No. 84.

under Article V hereof." Inasmuch as the contract gave Respondent the right to assign work to employees subject to a grievance, we find insufficient basis for finding that by the aforesaid conduct Respondent violated Section 8(a)(5).

12. The Charging Parties have excepted to the Trial Examiner's failure "to come to grips with the merit rating information issues," and with the alleged failure of Respondent to furnish certain relevant information requested in late 1963 and early 1964. They have also excepted to the Trial Examiner's failure to determine whether the Unions or Respondent must bear the costs of preparing copies of the requested information, and whether Respondent's refusals to furnish "Functional Capacity Records," except in connection with a grievance, and the addresses of new employees in the unit were lawful.

As to the "merit rating information," we find that, inasmuch as Respondent's refusal to make this information available occurred more than 6 months prior to the filing of the initial unfair labor practice charge, no unfair labor practice can be based thereon in view of Section 10(b) of the Act. Moreover, we reject the contention of the General Counsel and the Charging Parties that Respondent had fraudulently concealed the information requested and that Section 10(b) therefore is not applicable.

As more fully set forth in the Trial Examiner's Decision, between the fall of 1963 and the spring of 1964, the Unions made numerous demands upon the Respondent for information which appear to be relevant and necessary for intelligent bargaining and for administration of the existing collective-bargaining contracts. Respondent replied to these requests in substance, except as to the Functional Capacity Records" (separately discussed hereinafter), that it would not expend its own funds to prepare the reports and information desired, but that it would permit Unions' representatives to examine the underlying relevant records to ana-

lyze or treat them in the manner suitable to its needs. The Unions rejected this offer. Thereafter, in settlement of a proceeding under Section 10(j) of the Act instituted by the General Counsel to compel production of records, the parties stipulated that Respondent at its own expense would give the Unions copies of the information requested with certain deletions, and that the Unions would furnish a bond to cover Respondent's costs in the event that the Board should ultimately rule that Respondent was not legally obligated to bear or share the costs of preparing and furnishing such copies. Pursuant to such stipulation, Respondent furnished the Unions with copies of the requested records. According to the record, for the period August 17, 1964, through the first quarter of 1968, Respondent expended more than \$50,000 in complying with the Unions' requests for information.

An employer, if it is to fulfill its bargaining obligation under Section 8(a)(5), is required to furnish relevant information requested by the employee representative. But it does not follow that the union is entitled to such information in the exact form or on the exact terms requested. "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining."³⁴ "Good-faith bargaining requires only that such information be made available at a reasonable time and in a reasonable place and with an opportunity for the Union to make a copy of such information if it so desires."³⁵ These are the terms upon which Respondent generally offered to make available the information requested by the Unions. Respondent was not required to duplicate or conform its records, at its own cost, for the convenience of the Unions.

³⁴ *The Cincinnati Steel Castings Company*, 86 NLRB 592, 593.

³⁵ *Lasko Metal Products, Inc.*, 148 NLRB 976, 979.

By the stipulation, Respondent agreed to furnish the Unions with copies of "put-on"³⁶ and "termination"³⁷ records for unit employees, but deleting therefrom the addresses of such employees. In another proceeding involving the same parties the Board has held, with court approval, that respondent is obligated to furnish the union with the names and addresses of employees in the unit.³⁸ Under these circumstances, Respondent improperly insisted upon the deletion of addresses from these records and must bear the cost of such deletions.³⁹

By the stipulation, Respondent also agreed to furnish the Unions with copies of the "Employee Service Record" for employees in the East Hartford, Southington, and Middletown, Connecticut, plants, and with the "Personnel Data Listing"⁴⁰ for employees in the Windsor Locks and Broad Brook, Connecticut, plants, excluding from each list data concerning employees not included in the bargaining units represented by the Unions. These service records, compiled

³⁶ When a new employee commences work a "put-on-slip" is filled out.

³⁷ A "termination" form is filled out each time an employee is terminated.

³⁸ *United Aircraft Corporation*, 181 NLRB No. 150, enfd. 434 F.2d 1198 (C.A. 2).

³⁹ In view of the outstanding order requiring Respondent to furnish names and addresses of employees in the unit, an additional finding or order herein is unnecessary.

⁴⁰ The "Employee Service Record" and the "Personnel Data Listing" are reports containing data concerning plants, departments, and individual employees not necessarily represented by the Unions. Such reports list all hourly paid employees who work in the respective divisions of the Respondent irrespective of their union affiliation or representation. The employees are listed by name, clock number, plant, department, shift, job code, seniority date, weeks of service, rate, position, and rating group. The employees are further divided in order of seniority by department or area, or job rating group.

at regular intervals for company purposes, contain data concerning employees who are not in the bargaining unit represented by the Unions, as well as those who are so represented. In response to the demands of the Unions, Respondent had offered to make copies of the compilations available to the Unions provided the Unions would pay the cost of deleting the data concerning nonunit employees. In the alternative, Respondent offered to make available to the Unions' representatives the basic materials underlying the compilations so that the Unions could prepare their own lists. The Unions rejected both offers insisting that, as the requested compilations were in existence, they were entitled to copies of them, and that if Respondent desired to delete nonrelevant information Respondent should bear the cost of such deletions. Respondent was thus prepared to make available to the Unions relevant data; it was within its rights in refusing to make available concededly nonrelevant data. As we have stated, an employer is not required to make available information in the exact form or the exact terms requested by the bargaining representative. Inasmuch as the compilations requested contained irrelevant as well as relevant data, Respondent was not required to furnish copies of them in uncorrected form. Respondent could lawfully, as it did, offer the Unions access to the original records from which relevant data could be drawn, or the compilations with the irrelevant data deleted. But since Respondent was not required to furnish uncorrected copies of the compilations, it had the right to insist as a condition to furnishing such copies that the Unions pay the cost of deleting therefrom information Respondent was not required to furnish.

In response to the Unions' requests for copies of the "Physical Demands Record" for each job, and the "Functional Capacity Record" for every employee in the bargaining unit, Respondent refused to make copies of the former at its expense, but offered to make them available for copy-

ing by the Unions at reasonable times. We find that, by this offer, Respondent complied with its obligation under Section 8(a)(5). As to the "Functional Capacity Record" which is a record of physical disabilities and infirmities of employees discovered by a physician in a physical examination, Respondent's position was that such records should not be publicized without the employee's permission unless and until that individual's physical capacities become relevant to some particular problem. In view of the generally recognized confidential nature of a physician's report, we find that Respondent's position with respect to furnishing copies of such reports was a reasonable one and did not violate Section 8(a)(5) of the Act.

In summary, we find that, except for the costs of deleting addresses of unit employees from relevant records, Respondent was not required to defray the costs incurred in furnishing copies of such records to the Unions, and that Respondent did not violate Section 8(a)(5) in the positions it took on furnishing information to the Unions.⁴¹

Amended Conclusions of Law

1. Delete the Trial Examiner's Conclusions of Law 5 and 6, insert the following as Conclusion of Law 5, and renumber the following conclusions consecutively:

5. By the foregoing conduct, and by threats of economic reprisal for engaging in union or protected activities, interrogation creating the impression of surveillance of union activities, and offers of benefit conditioned upon ceasing to engage in union or other protected activities, Respondent interfered with, restrained, or coerced employees in the

⁴¹ We expect the Respondent to produce all relevant information in the least expensive manner consistent with reasonable dispatch; the assessment of costs is not to be used as a weapon of harassment. Any dispute concerning alleged excessive costs will be treated during the compliance stage of the proceeding.

exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Aircraft Corporation, East Hartford, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with economic reprisals for engaging in union or other protected activities; interrogating its employees concerning union activities in a manner constituting restraint or coercion in violation of Section 8(a)(1); and promising benefits to employees conditioned upon ceasing to engage in union or other protected concerted activities.

(b) Discouraging membership in Lodge #1746, Lodge #743, and Lodge #700, International Association of Machinists, AFL-CIO, or any other labor organization of its employees, by transferring or promoting employees to positions in violation of the Strike Settlement Agreements.

(c) In any like or related manner interfering with, restraining, or coercing its employees in violation of Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Identify and offer, according to seniority, to registered strikers on the preferred hiring list established by the Strike Settlement Agreements, all prestrike positions filled prior to January 1, 1961, by transfers and promotions within the operating organization of Respondent, discharging if necessary the present occupants of such positions, unless such strikers were reinstated prior to that date to

their prestrike or substantially equivalent positions without prejudice to their seniority or vacation or other rights and privileges, and make each of them whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board, for examination and reproduction, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine rights to reinstatement and backpay due.

(c) Notify immediately the employees involved, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(d) Post at the plants of the Pratt and Whitney Division at East Hartford and Manchester, Connecticut, plants of the Hamilton Standard Division at Broad Brook and Windsor Locks, Connecticut, and at its Canel plant, copies of the attached notice marked "Appendix." "Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said no-

"In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

tices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be, and it hereby is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., July 30, 1971.

EDWARD B. MILLER, *Chairman*
HOWARD JENKINS, JR., *Member*
RALPH E. KENNEDY, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBERS FANNING and BROWN, dissenting in part:

Our disagreement with the majority's opinion is confined to its reversal of the Trial Examiner's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by requiring all remaining strikers who had registered to return to work after the strike was settled in August 1960, but were not recalled by December 31, 1960, to apply as new employees thereby depriving them of the rights which the Act affords economic strikers.⁴³

⁴³ Member Brown separately dissents from that portion of the majority's opinion dealing with the assessment of the costs. For the first time, the majority overrules a long-accepted custom of the Board not to assess costs against a union, where an employer is required to furnish it information. The Respondent compiles at regular intervals for its own purposes two lists of records—"Employee Service Record" and "Personnel Data Listing"—for all of its employees. It conditioned the Union's request for copies of these lists, if the latter paid for the expense of eliminating from

We agree with the majority that the recall agreement was entered into good faith by the parties, but our version as to what they agreed to differs from that of the majority. They hold that it was understood that the preferred employment status of a striker who was not recalled by December 31 was terminated on that date; and that thereafter the Respondent was free to treat them as any other new applicant for employment. Our view of the agreement is that all strikers who had registered for reinstatement would be recalled until the Respondent reached its prestrike complement, which occurred on April 30, 1961.

The recall agreement is silent as to the status of the striker who would not be recalled by December 31; it merely states that after that date the Respondent would be free to hire new employees.⁴⁴ Certain implied conditions to the

each list the data concerning employees who are not included within the bargaining units. The majority finds that the Respondent did not violate Section 8(a)(5) in requiring the Unions to defray the costs of obtaining this information. I disagree. To maintain records in the operation of its business, which employs over 20,000 workers, the Respondent utilizes the latest in automatic office equipment, including a computer-printer system. This system is used in the Respondent's preparation of the two lists for its own use. Thus, I can not perceive any undue burdens in supplying the requested information, especially since there is testimony by a computer programmer employed by the Respondent which indicates that the information requested herein by the Unions (i.e., the two lists containing the names of employees only in the bargaining units) could be supplied with minimal cost and effort. Moreover, if the information sought is relevant to intelligent bargaining, as conceded herein, I do not believe that the Board should get involved with the matter of costs, which would open the door to probable harassment and dilatory conduct during the critical period of collective-bargaining negotiations. Accordingly, I would find that the Unions are entitled to the information without any assessment of costs and that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting on such costs as a condition of furnishing the information requested by the Unions.

⁴⁴ TXD, Strike Settlement Agreement, ¶ 4(c): "Strikers . . . on a Preferred Hiring List . . . will be recalled . . . at any time prior

agreement must therefore be considered to ascertain the true understanding of the parties.⁴³ The record shows that during the crucial settlement negotiations conducted on August 5, 1960, by top echelon representatives of both parties, with the Governor of Connecticut in attendance, Martin F. Burke, Respondent's vice president and chief negotiator, made it plain that all of the strikers (except for 50 who had allegedly engaged in misconduct and whose cases were to be separately arbitrated) would register to return to work and that, although all of them could not be immediately reinstated, the remaining strikers would be placed on a preferential hiring list and recalled from that list until the Respondent expected to reach its prestrike complement. The parties then agreed to the December 31 date.⁴⁴ Burke further explained that there would be a sufficient turnover

to January 1, 1961 before new employees are hired." Clearly, the parties agreed under this section that the Employer would not hire any new employees without recalling strikers before January 1, 1961. There is nothing in this provision, however, to suggest that the parties further agreed that subsequent to January 1 those strikers who had not been recalled would lose their statutory employment status under Section 2(3) of the Act. The Employer's right to hire new employees after January 1 does not carry with it the right to insist, approved as lawful by the majority, that the striker-employees, when recalled after that date, could only return to their jobs as new employees.

⁴³ Judge Clarie's opinion, in the Section 301 suit, which resolved the issues herein as they relate to Respondent's good faith in recalling strikers only up to December 31, 1960, and which conclusion was adopted by the majority and in which we concur, also resorts to the implied conditions of the agreement for a better understanding of the parties' intent. See 299 F.Supp. 877, 903.

⁴⁴ At the hearing before Judge Clarie, Burke testified as follows as to his version of the settlement with respect to returning strikers: "Well, we told them we could not employ all of them. We suggested that they have them registered and if their jobs were available, and we had work for them in the shop, they would be put back to work—I think we said immediately, as soon as we could possibly get through the job of signing them up, and

among the permanent replacements hired during the strike and that these vacancies would also be filled by the strikers on the preferential list by the end of October 1960, according to the estimated figures he presented." Thus, the December 31 date was to allow some leeway in accomplishing the reinstatement of the strikers under normal business conditions; and all of the strikers would have been recalled by that date, at the latest, but for the serious economic setback experienced by the Respondent during the August-December 1960 reinstatement period.

That all of the remaining strikers not recalled by December 31 could have been recalled by April 30, 1961, the date that Respondent achieved its prestrike complement, is clearly established by the fact Respondent hired more than 2,000 new employees during the January-April period, when business conditions improved, in addition to the 450 strikers who were also hired as new employees during the same period; and there still remained approximately 730 strikers who had also been forced to apply as new employees and had not yet been recalled by April 30.⁴⁵ As we see the agreement, the Respondent's inability to recall all of the strikers by December 31 due to its unforeseen economic problems amounted to a mere temporary impossibility to comply therewith, but did not suspend its duty to

getting the thing in operation. If the jobs had been filled and they were not available, they would be placed on a preferred hiring list, and would be hired—well, *we would do our hiring and filling out of any compement that we needed from that list*. The period agreed upon was until December 31, 1960." [Emphasis supplied pp. 9516-17.]

⁴⁵ *Id.*, pp. 9550-54. See also TXD, p. 52, 11. 1-15, where the 800 students referred to therein were considered by Respondent as permanent replacements, who would leave after Labor Day 1960.

⁴⁶ After January 1, 1961, the Respondent invited between 1,550 and 1,700 strikers who remained on the preferential hiring list to apply as a new employees; only about 1,180 of them did so.

recall all remaining strikers until it reached the prestrike complement.⁴⁹ Accordingly, we would find that the Respondent reneged in its agreement and unlawfully discriminated against all remaining strikers who should have been recalled by April 30, 1961; and to whom we would grant full reinstatement and backpay.

Assuming that the recall agreement, as found by the majority, provided that after December 31 the Respondent had no obligation whatever to the striking employees who had not been reinstated by that date, we would be compelled to hold that such a result was repugnant to the purposes and policies of the Act. The effect of the majority's interpretation of the agreement is to limit reinstatement rights of economic strikers to a 4½ month period, even though it is conceded that they had not been permanently replaced. There remained over 1,500 striking employees who would lose all seniority rights by being treated as new employees without regard to any possible temporary economic setback of the Employer's business that may eventuate; and would create a serious conflict with Section 9(c)(3) of the Act which provides for the eligibility of economic strikers to vote in a representation election for a period of 12 months after the commencement of a strike. Because of the latter factor alone, it seems doubtful that the Board should honor any strike settlement with a terminal date of less than 1 year. Although we also encourage the voluntary settlement of labor disputes by the parties involved, we would not honor a private agreement which purported to deny to so many employees so many statutory rights guaranteed them by the Act.⁵⁰ Moreover, the Respondent's good faith in

⁴⁹ Restatement of the Law, *Contracts*, Sec. 462, pp. 868-869 (1932).

⁵⁰ *Erie Resistor Corp.*, 132 NLRB 621, 631, aff'd. 373 U.S. 221. The majority's reliance on the original *Wooster Division* case (113 NLRB 1288; 121 NLRB 1492, second decision after remand) to support its approval of the recall agreement is not adequate prece-

entering into the agreement became suspect after December 31, as it ran newspaper ads for new employees and there is no explanation for the hiring between January-April 1961 of such a larger number of new employees as compared to strikers with superior work experience. Such conduct is inherently destructive of important employee rights, without reference to employer intent.⁵¹ Even if there may exist a limited area in which the parties could waive strikers' recall rights,⁵² this is not an appropriate case in which to approve such a waiver.

As we would find that after December 31 the remaining strikers retained their status as employees who were entitled to full reinstatement, with no loss of seniority and other privileges, we need not reach the concern of the majority that the Trial Examiner's reliance on *Laidlaw*⁵³ constitutes an unwarranted retroactive application of certain asserted new principles enunciated by the Supreme Court in its *Fleetwood* decision. In our opinion, a more precise precedent for the Trial Examiner's finding of an 8(a)(3) violation was *Fleetwood*, which did not make new law with regard to the reinstatement rights of the economic strikers there involved and the ones in the instant case. In both situations, the employer had not permanently replaced the strikers and had not reached its prestrike complement,

dent. That case was issued before the 1959 amendments to the Act which enacted the above-mentioned provision concerning a striker's eligibility to vote in an election. Moreover, a significant factor in the *Wooster* case was that substantially all of the striking employees were reinstated. Concerning the instant proceeding, we cannot agree with the majority's view that the recall agreement gave superior rights to those strikers who had not been permanently replaced.

⁵¹ See *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 380.

⁵² *Id.* at 381, fn. 8.

⁵³ *The Laidlaw Corp.*, 171 NLRB No. 175, enf'd. 414 F.2d 99 (C.A. 7), cert. denied 397 U.S. 920.

when the strikers requested reinstatement after the strike ended. The Court in *Fleetwood* held that strikers in the foregoing status do not depend on job availability as of the day they abandon a strike and request to return to work. On the contrary, the status of a striker as an employee continues until he has obtained other substantially equivalent employment or the employer can show some economic justification to defeat his status. In the words of the Court:

Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications."⁵⁴

The Court noted two types of situations where an employer may be justified in refusing to reinstate economic strikers, both of which were considered by the Board long before *Fleetwood*. The first is when all of the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations;⁵⁵ and the second basis is the elimination of a striker's job for legitimate economic reasons.⁵⁶ In finding an 8(a)(3) violation in *Fleetwood*, the Court emphasized the fact that the employer, as the Respondent herein, in-

⁵⁴ *Fleetwood*, *supra* at 381.

⁵⁵ *Mackay Radio & Telegraph Company*, 1 NLRB 201, *aff'd*, 304 U.S. 333, 345-346 (1938); *Brown and Root, Inc.*, 132 NLRB 486, 493-494 (1961).

⁵⁶ *Atlas Storage Division*, 112 NLRB 1175, 1179-80 (1955), *enfd. sub nom. Chauffeurs Local 200 v. N.L.R.B.*, 233 F.2d 233, 238 (C.A. 7).

tended to achieve its prestrike complement after the strike ended, but hired new employees instead of strikers.

In *Laidlaw*, the Board found that the employer violated Section 8(3) of the Act by terminating the employment status of strikers whose jobs were held by replacements on the date they applied to return to work, instead of recalling them as vacancies arose. The Board's holding rested on alternate grounds. First, that the employer's action was motivated by animus against the strikers; second, even absent an unlawful motive, the employer's action in hiring new employees rather than recalling strikers as jobs opened was inherently discriminatory, as no substantial business justification was shown, citing *Fleetwood*. Thus, one ground for finding a violation was the classic basis of unlawful discrimination; the other was on the basis of the *Fleetwood* principle that a striker's status as an employee does not depend on availability as of the day he requests to return to work. Although the Board in *Laidlaw* may have enhanced the striker's right to reinstatement on the basis of a reasonable interpretation of the *Fleetwood* rationale, and could be considered as a retroactive application of a principle not in existence when the instant conduct herein occurred, it does not follow that such application is improper. The Board, in *Laidlaw*, balanced the mischief of producing a result that would completely ignore the statutory rights of the employees there involved against the employer's asserted reliance on a prior Board rule or policy relating to economic strikers. Were it necessary for us to make a determination of such issue herein, the equities would clearly favor the strikers.

Dated, Washington, D.C. July 30, 1971.

JOHN H. FANNING, *Member*

GERALD A. BROWN, *Member*

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board having found, after
a trial, that we violated Federal law by certain conduct, we
hereby notify our employees that:

WE WILL NOT threaten our employees with reprisals
because they engage in union activities.

WE WILL NOT question our employees about their
union activities so as to create the impression that we
are unlawfully watching those activities.

WE WILL NOT promise benefits to our employees in
order to discourage them from engaging in union ac-
tivities.

WE WILL NOT discourage membership in Lodge No.
1746, Lodge No. 743, and Lodge No. 700, International
Association of Machinists, AFL-CIO, or any other
labor organization of our employees, by transferring
or promoting them to positions in violation of the
Strike Settlement Agreements.

WE WILL reinstate and give backpay to those of our
employees who were not reinstated to their positions
after the 1960 strike in violation of the Strike Settle-
ment Agreements.

WE WILL NOT unlawfully interfere with our em-
ployees' union activities.

UNITED AIRCRAFT CORPORATION
(Employer)

Dated By
(Representative) Title

We will notify immediately the employees involved, if pres-
ently serving in the Armed Forces of the United States, of
the right to full reinstatement, upon application after dis-
charge from the Armed Forces, in accordance with the Se-
lective Service Act and the Universal Military Training and
Service Act.

This is an official notice and must not be defaced by
anyone.

This notice must remain posted for 60 consecutive days
from the date of posting and must not be altered, defaced,
or covered by any other material.

Any questions concerning this notice or compliance with
its provisions may be directed to the Board's Office, Bull-
finch Building, 15 New Chardon Street, Boston, Massachu-
setts 02114, Telephone 617-223-3300.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases Nos. 1-CA-3355(1-3), 1-CA-3357, 1-CA-3359,
1-CA-3528, 1-CA-3532, 1-CA-4201, 1-CA-4492

UNITED AIRCRAFT CORPORATION
(Pratt and Whitney Division)

and

LODGE No. 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

Case No. 1-CA-3396

UNITED AIRCRAFT CORPORATION
(Pratt and Whitney Division)

and

EDWARD F. GRABOWSKI, AN INDIVIDUAL

Case No. 1-CA-4802

UNITED AIRCRAFT CORPORATION
(Pratt and Whitney Division—Connecticut
Advanced Nuclear Engineering Laboratory)

and

LODGE No. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

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Cases Nos. 1-CA-3358, 1-CA-3372, 1-CA-3435, 1-CA-3455,
1-CA-3571, 1-CA-3634, 1-CA-4202, 1-CA-4491

UNITED AIRCRAFT CORPORATION
(Hamilton Standard Division)

and

LODGE No. 743, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

UNITED AIRCRAFT CORPORATION
(Hamilton Standard Division)

and

Case No. 1-CA-3434

FRANCIS J. KARCZ, AN INDIVIDUAL

and

Case No. 1-CA-3900

WILLIAM A. GRANT, AN INDIVIDUAL

APPEARANCES:

*Harold M. Kowal, Esq., Norman Zankel, Esq.,
S. Anthony di Ciero, Esq., Thomas M. Harvey, Esq.,
and David B. Ellis, Esq., of 24 School Street,
Boston, Mass., for the General Counsel.*

*Mozart G. Ratner, Esq., and Plato E. Papps, Esq.,
Wash., D.C., and William S. Zeman, Esq., of
Hartford, Conn., for the Charging Parties and Union.*

*Joseph C. Wells, Esq., and Donald R. Holley, Esq.,
of Wash., D.C., for the Respondent Employer.*

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Trial Examiner's Decision

STATEMENT OF THE CASE

LEE J. BEST, Trial Examiner: The above captioned cases brought under Section 10(b) of the National Labor Relations Act (herein called the Act), and consolidated for the purpose of hearing pursuant to Section 102.33, Rules and Regulations of the National Labor Relations Board, Series 8, as amended, were heard before the undersigned Trial Examiner at numerous intermittent sessions beginning on May 16, 1963, and closing on June 11, 1968; at which all parties were present and represented by counsel, afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues involved, to present oral argument on the record, and to file written briefs with the Trial Examiner.

Pending charges and proceedings herein against the Pratt & Whitney Division, United Aircraft Corporation, consist of the following:

Case No. 1-CA-3355(1-3) in which the initial charge was filed on November 21, 1960, by Lodge #1746, International Association of Machinists, AFL-CIO;

Case No. 1-CA-3357 in which the initial charge was filed on November 23, 1960, by Lodge #1746, and thereafter supplemented on successive dates by fourteen amended charges up to and including September 30, 1963;

Case No. 1-CA-3359 in which the initial charge was filed on November 25, 1960, by Lodge #1746;

Case No. 1-CA-3396 in which the initial charge was filed on January 25, 1961, by Edward F. Grabowski (an individual);

Case No. 1-CA-3528 in which the initial charge was filed on July 13, 1961, by Lodge #1746;

Case No. 1-CA-3532 in which the initial charge was filed on July 24, 1961 by Lodge #1746;

Case No. 1-CA-4201 in which the initial charge was filed on June 7, 1963, and a first amendment charge on June 10, 1963, by Lodge #1746;

Case No. 1-CA-4492 in which the initial charge was filed on February 19, 1964, by Lodge #1746;

Case No. 1-CA-4802 in which the initial charge was filed on November 18, 1964, by Lodge #700, International Association of Machinists, AFL-CIO, against Connecticut Advanced Nuclear Engineering Laboratory, Pratt & Whitney Division, United Aircraft Corporation (known as the Canel plant).

Pending charges and proceedings herein against the Hamilton Standard Division, United Aircraft Corporation, consist of the following:

Case No. 1-CA-3358 in which the initial charge was filed on November 23, 1960, by Lodge #743, International Association of Machinists, AFL-CIO, and thereafter on successive dates supplemented by fourteen amended charges up to and including September 30, 1963;

Case No. 1-CA-3372 in which the initial charge was filed on December 12, 1960, by Lodge #743;

Case No. 1-CA-3434 in which the initial charge was filed on March 17, 1961, by Francis J. Karcz (an individual);

Case No. 1-CA-3435 in which the initial charge was filed on March 20, 1961, by Lodge #743;

Case No. 1-CA-3455 in which the initial charge was filed on April 24, 1961, by Lodge #743.

Case No. 1-CA-3571 in which the initial charge was filed on September 6, 1961, by Lodge #743;

Case No. 1-CA-3634 in which the initial charge was filed on November 7, 1961, by Lodge #743;

Case No. 1-CA-3900 in which the initial charge was filed on August 23, 1962, by William A. Grant (an individual);

Case No. 1-CA-4202 in which the initial charge was filed on June 6, 1963, by Lodge #743, and thereafter supplemented by a first amended charge filed on June 10, 1963;

Case No. 1-CA-4491 in which the initial charge was filed on February 19, 1964, by Lodge #743;

Based upon the foregoing charges, the General Counsel of the National Labor Relations Board issued a consolidated complaint against United Aircraft Corporation (Pratt & Whitney Division) and (Hamilton Standard Division), jointly referred to as the Respondent, alleging that by certain acts described in paragraphs 29a, 29c, 30, 30A, and 30B, of the complaint, the Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act; that by certain acts described in paragraphs 33 and 35 of the complaint Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act; and that by acts described in paragraph 37 of the complaint the Respondent also engaged in independent violations of Section 8(a)(1) of the Act. In due course the Respondent filed an answer denying all allegations of unfair labor practices; and as a special defense to the allegations of paragraph 29a of the complaint specifically pleads as a bar the limitation set forth in Section 10(b) of the Act, as follows:

PROVIDED, That no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge

by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.¹

From my observation of the witnesses, consideration of all oral testimony and documentary evidence, and upon the entire record in the case, I make the following:

FINDING OF FACT

I. BUSINESS OF RESPONDENT EMPLOYER

United Aircraft Corporation is a corporation (consisting of several divisions) duly organized under and existing by virtue of the laws of the State of Delaware; and at all times material herein has been and is now engaged in the manufacture and sale of aircraft engines, helicopters, aircraft accessories, parts, electronic devices and components thereof which are being distributed to the Armed Forces of the United States of America, the commercial aircraft industry, and others. Involved in these proceedings is the Pratt & Whitney Division consisting of plants at East Hartford and Manchester, Connecticut (herein jointly called the East Hartford Plant), and the Connecticut Advanced Nuclear Engineering Laboratory at Middletown, Connecticut (herein called the Canel plant). Also involved is the Hamilton Standard Division consisting of plants at Windsor Locks and Broad Brook, Connecticut (herein called the Windsor Locks Plant and the Broad Brook plant, respectively).

In the course and conduct of its business operations in the State of Connecticut during the past representative

¹ The first charge herein (Case No. 1-CA-3355 (1-3)) was filed by Lodge #1746 on November 20, 1960, and copies thereof served the Pratt and Whitney Division, United Aircraft Corporation on November 21, 1960; thereby tolling as of that date the 6-months limitation for issuing a complaint, as provided in Section 10(b) of the Act.

year, the Respondent purchased and received directly from sources outside the State of Connecticut goods, wares, merchandise, and raw materials valued in excess of \$1,000,000; and during the same period shipped from its various plants within the State of Connecticut directly to points outside that State goods, materials, and finished products valued in excess of \$1,000,000. I find, therefore, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Lodge #1746, International Association of Machinists, AFL-CIO, is a labor organization with the meaning of Section 2(5) of the Act; and at all times material to this case by virtue of Section 9(a) of the Act was the exclusive representative for the purposes of collective bargaining of a majority of the employees at the Pratt & Whitney Division in each of the following units, respectively, which I find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

1. All production and maintenance employees of the United Aircraft Corporation, Pratt & Whitney Aircraft Division, East Hartford, Connecticut, at the East Hartford plant (including the DE Lab and the Willgoos Lab), including inspectors, crib attendants, material handlers, factory clerks and working leaders; but excluding timekeepers, engineering and technical employees, laboratory technicians, foremen's clerks, salaried office and clerical employees, medical department employees, first-aid employees, plant protection employees, executives, plant superintendents, division superintendents, general foremen, foremen, assistant foremen, group supervisors, watch engineers, and all other supervisors as defined in the National Labor Relations Act, as amended;

2. All production and maintenance employees of the United Aircraft Corporation, Pratt & Whitney Aircraft Division, at its Manchester, Connecticut, plant (Cheney Mills Buildings 1, 2, 3, 19, the Finishing Mill, and the Weaving Mill) including inspectors, crib attendants, material handlers, factory clerks, and working leaders; but excluding timekeepers, professional employees, engineering and technical employees, laboratory technicians, foremen's clerks, office and clerical employees, medical department employees, first-aid employees, plant protection employees, executives, plant superintendents, division superintendents, general foremen, foremen, assistant foreman, group supervisors, watch engineers, and all other supervisors as defined in the National Labor Relations Act, as amended.

Representatives of Lodge #1746 involved herein include Business Representative George J. M. Cope, President Herman W. Muise, President D. Frazer, Recording Secretary Phillip F. Kohler, and Financial Secretary Grace Hislop.

Lodge #1746 A, representing employees in an appropriate unit at a plant of the Pratt & Whitney Division in Southington, Connecticut, is not a party involved in these proceedings.

Lodge #700, International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act; and at all times material herein by virtue of Section 9(a) of the Act was and now is the exclusive representative of employees of the Pratt & Whitney Division at the Connecticut Advanced Nuclear Engineering Laboratory, Middletown, Connecticut (called the Canel Plant), in a unit which I find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as follows:

1. All production and maintenance employees at the Canel Plant, including inspectors, crib attendants, material handlers, and working leaders; but excluding all timekeepers, engineering and technical employees, professional employees, laboratory technicians, foremen's clerks, salaried office and salaried clerical employees, medical employees, first-aid employees, plant protection employees, executives, plant superintendents, division superintendents, general foremen, foremen, assistant foremen, group supervisors, watch engineers, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

Lodge #743, International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act; and by virtue of Section 9(a) of the Act was at all times material herein and now is the exclusive representative of the employees of the Hamilton Standard Division, United Aircraft Corporation, in the following units, which I find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as follows:

1. All production and maintenance employees at the Windsor Locks Plant, including working leaders and all hourly-rated technicians in the chemical, rubber, metallurgical, vibration, and electronic laboratories, but excluding executives, professional employees, salaried technicians in the Engineering Department, foremen's clerks who have access to confidential information, draftsmen, plant protection employees, Medical Department employees, salaried office and salaried clerical employees, outside servicemen, truckdrivers, watch engineers, group supervisors, and all other supervisors as defined in the National Labor Relations Act, as amended;

2. All production and maintenance employees at the Broad Brook Plant, including working leaders and hourly-rated technicians in the electronics laboratory, but excluding executives, professional employees, salaried technicians in the Engineering Department, foremen's clerks who have access to confidential information, draftsmen, plant protection employees, Medical Department employees, salaried office and salaried factory clerical employees, timekeepers, outside service men, truckdrivers, watch engineers, group supervisors, and all other supervisory employees as defined in Section 2(11) of the National Labor Relations Act, as amended.

Representatives of Lodge #743 involved herein include Business Representative John R. Sullivan and President Butler J. Seedman. Representatives of the Grand Lodge, International Association of Machinists, AFL-CIO, and District #91 include General Counsel Plato E. Papps, Grand Lodge Representative Raphael R. Oehler, and Organizer Raymond Jutras.

III. The Unfair Labor Practices

A. *Factual Prestrike Background*

With respect to a period of approximately seven years prior to the strike of 1960, it is alleged in paragraph 29a of the final consolidated complaint that since on or about September 11, 1953, and continuing to the inception of the strike on June 8, 1960, Respondent has refused to bargain collectively in good faith with Lodge #1746 and Lodge #743 (jointly called the Union), as exclusive representatives of its employees in aforesaid appropriate units by refusing to furnish the Union information necessary and relevant to its functions as exclusive representative in policing the contracts then and thereafter in force, in serving and representing the employees in bargaining collectively

with Respondent and related matters, although Respondent had such information in its possession and concealed such possession and such information from the Union, and although the Union had requested such information on several occasions since September 11, 1953. It is specifically alleged in paragraph 31 of the complaint that the strike beginning June 8, 1960, and ending on or about August 11, 1960, was caused and prolonged by the aforesaid conduct alleged in paragraph 29a of the complaint.

The record herein provides an accurate and complete history of the bargaining and contractual relationships between United Aircraft Corporation and various local lodges of the International Association of Machinists for a period of approximately seventeen (17) years dating back to the year 1950; during which period prior to 1960 there is no record of any strike, lockout, or failure to reach agreements, thereafter incorporated into written contracts signed by all contracting parties. On August 10, 1950, the President and Business Representative for Industrial Aircraft Lodge No. 1746 (IAM) directed a letter to the Personnel Director of United Aircraft Corporation requesting that the Union be furnished with certain information concerning employees; and pursuant thereto the Respondent complied and furnished to the Union an I.B.M. run-off² listing numerically by clock numbers all employees in the unit showing from left to right seven (7) columns of information as follows: (1) Clock number, (2) Job Code, (3) Name, (4) Labor grade, (5) Rate range position, (6) Department, and (7) Base rate pay. Thereafter, negotiations continued until agreements were reached and incorporated into comprehensive three (3) year contracts between the Respondent and the Union with respect to Lodge #1746 representing employees of

² This document appears in evidence as Respondent's Exhibit No. R-36.

the Pratt and Whitney Division and Lodge #743 representing employees of the Hamilton Standard Division. These contracts contained elaborate and comprehensive articles designated as (1) Coverage, (2) Recognition, (3) Non-Discrimination, (4) Check-off, (5) Grievance Procedure, (6) Wages and Hours, (7) Seniority, (8) Vacations, (9) Reemployment of Veterans, (10) General Provisions, (11) Strike or Lock-Out, and (12) Duration. Information to be furnished to the Union was an outstanding feature of these 1950 negotiations for new contracts. Article IV, Check-Off, required that the Respondent furnish to the Union each month a list of the employees from whose earnings dues deductions were made and the amount of such deductions. Article V, Grievance Procedure, Section 2, Step 3, required that "The Company will produce such pertinent available and existing individual production payroll, attendance records, and disciplinary notices pertaining to the employee involved as may be necessary to the settlement of a grievance at this step of the grievance procedure." Article VI, Wages and Hours, Section 10, required that the Respondent furnish to the Union (a) a copy of the Hourly Job Rating Plan, including factor and degree definitions and point scores, and (b) detailed job description sheets covering all hourly-rated jobs included in the bargaining unit. Section 14 of Article VI required that the Union be furnished sample copies of Employee Performance Rating Sheets together with a description of the factors, the weighing of the factors, and the ranges of scoring points which relate to the established rating steps. Section 15 of Article VI required that the Respondent quarterly furnish to the Union a listing of the names of those employees in the bargaining unit who within the previous calendar quarter have received an increase in base rate of pay as a result of a performance rating, including the name, department number, job code, previous base rate, new base rate and rating of such employees. Although recognized in Section 13 that the administration

and operations of the Employee Performance Rating Plan are *solely* the functions and responsibilities of Management, it was provided in Section 16 that upon request to his foreman, an employee will be advised of his performance rating and Section 17 provided that "A claim by an employee that he has not been properly rated under the Employee Performance Plan may be processed as a grievance under Article V of this agreement." Article VII, Seniority, Section 4, with respect to general lay-offs for an indefinite period, required that Respondent make available a list indicating the names of the employees to be laid off and their seniority status in relation to the remaining employees in the department involved. Section 5 of Article VII provided that "The Company shall prepare a list showing the seniority of the employees covered by this agreement each six (6) months and a copy of such list will be given to the president of the Union." The record shows that Respondent fulfilled its aforesaid contracts with respect to furnishing information to the Union, and I find no evidence of any additional information requested by the Union during the life of those contracts prior to September 1953. It is not contended otherwise by the General Council. Correspondence between the parties shows that the Respondent conducted a course of training for selected representatives of the Union in the fundamentals of the Hourly Job Rating Plan and the Employee Performance Rating Plan in effect at the Pratt and Whitney Division.

On September 11, 1953, Lodge No. 1746 directed a letter to the Pratt and Whitney Division requesting information concerning the East Hartford, Meriden and Portland plants, as follows:

In connection with the contract now in effect between the Company and Lodge 1746 which terminates on December 4, 1953, and to facilitate the drafting of the Union demands for a new agreement and the negotiation thereof, will you kindly furnish us as soon as

possible with the following information on the East Hartford, Meriden and Portland plants:

1. The average straight-time hourly earnings of all the employees in the bargaining unit represented by Lodge 1746.
2. The average hourly earnings by labor grade of the employees in the bargaining unit represented by Lodge 1746.
3. The number of employees in each labor grade.
4. The number of employees at each rate, that is "Starting Rate, Job Rate," etc. of each labor grade.
5. A copy of the Company's financial statement for the year 1952 and any financial statement issued by the Company for any period in 1953.
6. A copy of all existing Pension Plans covering employees of the Corporation.

In reply thereto, the Respondent replied on September 21, 1953, as follows:

This will acknowledge receipt of your letter of September 11 requesting information concerning employee earnings, ratings, financial statements, pension plans, etc., which you state will enable the Union to facilitate coming bargaining negotiations.

We will be glad to cooperate with you and supply you with the information which is available along the lines you request. We are, therefore, enclosing the following:

1. A copy of the United Aircraft Corporation Annual Report dated December 31, 1952.
2. A copy of the United Aircraft Corporation consolidated financial statement dated June 30, 1953.

3. A copy of the Retirement Income Plan describing the present pension plan for employees which the Union represents.

We would appreciate advice as to why you make this formal request for information concerning financial reports and pension plans inasmuch as this is public information which is readily available to you. Indeed, the annual financial report and the description of our pension plan, which are enclosed herein, were furnished to all our employees, including the local officers.

The rest of the information which you request is information which we do not have available in the form which you have specified. We, of course, do have employee records which could be analyzed to obtain the information in that form. Such an analysis would require considerable time and effort.

If you believe that this information which you have requested is of sufficient value to warrant the expenditure of this time and effort, we will be glad to make the employee records which we normally maintain available to you at our offices so that you can make the necessary analysis.

The record shows that the Union thereupon filed charges against the Respondent in Case No. 1-CA-1575 with the First Regional Office of the National Labor Relations Board in Boston, Massachusetts, but upon investigation the Regional Director refused to issue a complaint, and after appeal to the General Counsel of the National Labor Relations Board in Washington, D. C. the charges were withdrawn. Thereafter, the Pratt and Whitney Division made available its records at the East Hartford plant, and the Union sent in a clerical research team to make an analysis of the records at its own expense. After considerable research, this project was abandoned by the Union. In the

meantime negotiations were completed and the agreements reached were incorporated into a new contract with Lodge No. 1746 in January, 1954, to remain in full force and effect until December 4, 1955. Similar new contracts were entered into by and between the Hamilton Standard Division and Lodge No. 743 for its Broad Brook and Windsor Locks plants to remain in full force and effect until April 21, 1956. Provisions in the new contracts with respect to data and information to be furnished to the Union were substantially the same as those contained in previous contracts; and there is no contention or evidence that the Company failed to comply with these contract provisions.

Preparatory to negotiations for a new contract on May 27, 1955, Lodge No. 1746 directed a letter requesting the Pratt and Whitney Division to furnish complete seniority and payroll information for each employee in the bargaining unit, as follows:

In order to police the existing agreement, bargain intelligently and evaluate properly our own and managements wage proposals in our coming contract negotiations, Lodge 1746, IAM, herewith requests that you supply it, as soon as possible but no later than July 24, 1955 with complete seniority and payroll information for each employee in the unit represented by Lodge 1746 for the period covered by the present contract as requested in items one thru ten as follows:

1. Name
2. Clock Number
3. Shift
4. Date of Hire
5. Weeks of Seniority
6. Occupational Group and Area in which seniority is recognized.

7. Position of employee in relation to other employees in Occupational Group in Seniority Area.
8. Position of employee in classification of his labor grade and hourly pay rate.
9. Date of last merit raise and amount of raise.
10. Date on which employee began work in his classification.

It is further requested that information be given us covering the group we represent as follows:

1. The number of employees in each labor grade.
2. The average hourly rate of pay of employees in unit for which Lodge 1746 is the bargaining agent.
3. Information on costs of the medical insurance program showing:
 - a—Premiums paid
 - b—Dividends and or rebates received by the Company

The union requests this data because without it, we cannot know the actual wage structure to the present contract minimum and so cannot draft and negotiate intelligently our own wage proposals nor evaluate yours, nor can we determine whether the present contract is being properly applied.

In reply to above request for information, the Respondent by letter dated June 21, 1955, stated its position with respect thereto, as follows:

Mr. Norbert Dion, President
Industrial Aircraft Lodge No. 1746, I.A.M.
1169 Main Street
East Hartford, Connecticut

Dear Mr. Dion:

This will acknowledge receipt of your letter of May 27 in which you request numerous items of information concerning seniority, job classification, wage rates and increases for each employee in the unit represented by Lodge 1746 for the period covered by the present contract, the average hourly rate of pay for all employees in the bargaining unit represented by Lodge 1746, the number of employees in each labor grade, and information on the cost of the medical insurance program. You claim that this information is necessary in order to police the existing agreement, bargain intelligently, and evaluate properly your own and management's wage proposals in the coming contract negotiations.

You should be well aware of the company's position with respect to requests of this type. On September 11, 1953, Mr. Theodore R. Bothus, then President of I.A.M. Lodge No. 1746, wrote to me requesting information of a similar type. I replied to him on September 21, 1953 by a letter in which I outlined the manner by which Lodge No. 1746 could obtain any pertinent employee information which it desired. Apparently my offer was unacceptable to Lodge No. 1746 because it promptly filed an unfair labor practice charge against United Aircraft Corporation with the National Labor Relations Board (Case No. 1-CA-1575). As your records will show, the Regional Director of the First Regional Office of the National Labor Relations Board declined to issue a complaint based upon this charge. Thereafter, Lodge No. 1746 filed an appeal with the

General Counsel of the National Labor Relations Board, requesting him to reverse the Regional Director and to issue a complaint in the matter. The General Counsel did not pass on this appeal because, before he could do so, the union withdraw its charges. Shortly thereafter, the company and Lodge No. 1746 entered into a new contract for a 2-year period in which, among other things, the company agreed to furnish personnel information to the union at specified intervals, presumably to enable the union to "police" the contract.

The offer of cooperation which we extended Lodge No. 1746 in our letter of September 21, 1953 has never been rescinded and is, therefore, still open. Indeed, much of the information which you request in your letter of May 27, 1955 is available to you through an examination and analysis of information which is available to you under the terms of the now existing contract. All of the information which you request can certainly be obtained if Lodge No. 1746 will utilize our standing offer of cooperation.

With respect to your inquiry concerning the medical insurance program, I believe that you know that this insurance is underwritten by the Connecticut Medical Service, a nonprofit association of physicians organized for the purpose of providing certain medical benefits throughout the State of Connecticut. This organization charges a uniform premium for its services based upon the experience of all of its subscribers in the State and the premium paid by Pratt & Whitney Aircraft and its employees is the same as that paid by all other subscribers. Since there is no individual experience rating under this program, there are, consequently, no dividends or rebates paid to any one by the Connecticut Medical Service.

The premiums paid for the medical insurance program have been made known to all Pratt & Whitney Aircraft Division employee subscribers, including union representatives, and, as you know, this division pays 50% of the premium in each case.

Very truly yours,

PRATT & WHITNEY AIRCRAFT
T. R. DOWNS
Personnel Manager

Likewise, on November 8, 1955, Lodge 743 directed a letter to the Hamilton Standard Division requesting complete seniority and payroll information for each employee in its bargaining unit, as follows:

In order to bargain intelligently and evaluate properly our own and management's wage proposals in our coming contract negotiations, Lodge 743, I.A.M., herewith requests that you furnish it, as soon as possible with complete seniority and payroll information for each employee in the unit represented by Lodge 743 for the period covered by the present contract as requested in items one thru seventeen as follows:

1. Rat, Unit
2. Dept
3. Shift
4. Clock Number
5. Employee Name
6. Sex
7. Job Code
8. Rate Pos.
9. R GRP

10. Lab. Gr.
11. Seniority Date
Mo. Day Yr.
12. Old Dept
13. New Dept
Sen. Date
Mo. Day Yr.
14. Occ. Code
15. Base Rate
16. Old Rate
17. Job Title

It is further requested that information be given us covering the group we represent as follows:

1. The number of employees in each labor grade.
2. The average hourly rate of pay of employees in the unit for which Lodge 743 is the bargaining agent.
3. Information on costs of the medical insurance program showing:
 - a. Premiums paid
 - b. Dividends and/or rebates received by the Company.

The Union requests this data because without it, as previously stated, we cannot draft and negotiate intelligently our own wage proposals, now in the process of preparation, nor properly evaluate yours when presented to us during our coming negotiations.

The Respondent replied by letter of November 29, 1955, as follows:

This will acknowledge receipt of your letter of November 8, 1955, in which you request numerous items of information concerning employees in the bargaining unit represented by Lodge 743. You claim that this information is necessary because without it your union cannot draft and negotiate intelligently its wage proposals now in the process of preparation, nor properly evaluate any proposals which may be made by the company during coming negotiations.

Some of the abbreviations which you use to designate certain items of information which you have requested are not intelligible to us. It is, therefore, impossible to advise you whether such things are available in our records. You request other items of information which we do not have available in the form which you have specified. However, it is probable that a search of our basic employee records plus some rather extensive analyses thereof would produce all of the information which you have requested. Such an examination and analysis of our basic employee records would require considerable time and effort.

If you believe that the information which you have requested is of sufficient value to warrant the expenditure of this time and effort, we will be glad to make the employee records which we normally maintain available to you at our offices.

With respect to your inquiry concerning the medical insurance program, I believe that you know that this insurance is underwritten by the Connecticut Medical Service, a non-profit association of physicians organized for the purpose of providing certain medical benefits throughout the State of Connecticut. This organization charges a uniform premium for its services based upon the experience of all of its subscribers in the State and the premium paid by Hamilton Standard Division and its employees is the same as that

paid by all other subscribers. Since there is no individual experience rating under this program, there are, consequently, no dividends or rebates paid to any one by the Connecticut Medical Service.

The premiums paid for the medical insurance program have been made known to all Hamilton Standard Division employee subscribers, including union representatives, and, as you know, this division pays 50% of the premium in each case.

Thereafter, Lodge No. 1746 and the Pratt and Whitney Division completed their negotiations and reached agreements which were incorporated into a new contract dated December 1, 1955, to remain in full force and effect until December 4, 1957; and concurrently therewith Lodge No. 743 and the Hamilton Standard Division signed new contracts with respect to the Broad Brook and Windsor Lock plants, to remain in full force and effect until April 21, 1958. Information to be furnished the Union remained substantially the same as that provided in previous contracts; and there is no contention or evidence that the Company failed to comply with such contract provisions or that other additional information was requested during the term of the contract. Article XI in each contract provided that "The Union will not call or sanction any strike, slowdown, or concerted stoppage of work during the period of this agreement. The Company agrees that there will not be a lockout of employees

Employees participating in any strike, slowdown, or concerted stoppage of work shall be subject to discharge by the Company without recourse to the grievance procedure or arbitration."

Upon expiration of the foregoing contracts in December 1957 and April 1958, respectively, Lodge No. 1746 and the Pratt and Whitney Division negotiated and entered into

a new contract to remain in full force and effect until December 4, 1959; and likewise, Lodge No. 743 and the Hamilton Standard Division executed similar new contracts to remain in full force and effect until April 21, 1960; subject to reopening at the end of the first year for the sole purpose of negotiating a general change in the base hourly rates set forth in Schedule "A" annexed thereto. In each of these new contracts it was provided in Section 6, Article VII that "The company shall prepare a list showing the seniority of the employees covered by this agreement each six (6) months and a copy of such list will be given to the president of the Union." In Section 14, Article VI, the Company agrees to make available to the Union at quarterly intervals records disclosing the names of employees in the bargaining unit who in the previous calendar quarter have received an increase in the base rate as a result of a performance rating to reveal the name, department number, job code, previous base rate, new base rate, and rating of such employees. Section 2, Article V, required the Company to furnish at Step 3 of the grievance procedure such pertinent existing production, payroll, attendance records, and disciplinary notices pertaining to the employee involved as may be necessary to the settlement of a grievance; and Section 11, Article VI, required the Company to provide the Union with detailed job description sheets covering new or changed hourly-rated jobs included in the bargaining unit as set forth in Article I hereof included in the bargaining unit as set forth in Article I hereof within thirty (30) days following final approval of such jobs. It is not contended that the Company failed to comply with any of these contract requirements to furnish information.

In the meantime on April 4, 1958, the Grand Lodge, Association of Machinists, issued to its membership everywhere Official Circular No. 596 containing instructions, as follows:

INSTRUCTIONS The following are issued as official policy of the IAM designed to most effectively promote and prosecute our aims, objectives, and approved programs:

- A. No local or district lodge may propose less or agree to accept lesser terms and conditions than our national objectives, until and unless the International President or his designated representative or an authorized committee releases the local or district from the specific objectives involved.
- B. No local or district lodge may propose less or agree to accept lesser terms and conditions than the applicable corporation-wide objectives, until and unless the International President or his designated representative or an authorized committee releases the local or district from the specific objectives involved.
- C. Prior to any vote to accept or reject a proposed agreement by any IAM bargaining unit affected by multi-unit agreements with the same employer, company or corporation, the International President or his designated representative or an authorized committee shall determine whether all the units shall be combined for voting purposes or shall be permitted to vote separately or in what combination.
- D. In the event separate bargaining units are authorized to vote separately, the ballot shall be a conditional ballot saying in effect that a vote to accept is conditioned on the acceptance of the employer's offer at all other units of the company open for and engaged in negotiations.
- E. Each local or district lodge must, at the first bargaining opportunity, bring its next bar-

gaining period and the anniversary date of its contract with the employer into proximate timing with all other units of the same company, unless a deviation is authorized by the International President or his designated representative, or an authorized committee.

For the purpose of these instructions, the Grand Lodge Representative assigned to coordinate bargaining between the several units of a company or corporation is the designated representative. For the aircraft missile program the Aircraft Advisory Committee appointed by the International President is an authorized committee.

On September 25, 1958, Lodge No. 1746 directed a letter to the Pratt and Whitney Division, as follows:

Dear Mr. Morse:

Lodge 1746 of the International Assoc. of Machinists is preparing a wage and classification study for use in our forthcoming negotiations. This study must be completed for use in the preparation of our proposals to you for our coming wage reopener. Accordingly and in order to bargain intelligently on these proposals we are requesting that you furnish us the following data before October 12, 1958.

1. Name
2. Clock No.
3. Shift
4. Date of Hire
5. Weeks of Seniority
6. Occupational Group and Area in which Seniority is recognized for each employee

7. Position of employee in relation to other employee in occupational group in each seniority area
8. Position of each employee in classification of his labor grade and his hourly rate.
9. Date of last merit raise and amount of raise.
10. Date on which employee began work in his classification.
11. The number of leadmen assigned to each job classification or classificational group.
12. The departmental listing showing the job classifications which cover the jobs in each department.
13. The number of employees in each labor grade.
14. The average hourly rate of pay of employees in unit for which Lodge 1746 is the bargaining representative.

Your prompt cooperation will be greatly appreciated and, in our opinion, considerably expedite our negotiations.

Thereafter, on February 3, 1959, Lodge No. 1746 directed a similar letter to the Pratt and Whitney Division requesting information as follows:

Dear Mr. Morse

In order to police the existing agreement, bargain intelligently and evaluate properly the Union's and Management's wage proposals in our coming contract negotiations of 1959, Industrial Aircraft Lodge 1746 herewith requests the Company to make the following available.

Complete seniority and payroll information for each employee in the units represented in Industrial Aircraft Lodge 1746 IAM for the period covered by the present agreement as requested in items one through ten as follows:

1. name
2. clock number
3. shift
4. date of hire
5. weeks of seniority
6. occupational group and area in which seniority is recognized
7. position of employee in relation to other employees in occupational group in seniority area
8. position of employee in classification of his labor grade and hourly pay rate
9. date of last merit raise and amount of raise
10. date on which employee began work in his classification

The Union requests this data because, without it, we cannot know the actual wage structure to the present contract minimums and so cannot draft and negotiate intelligently the Union's wage proposals nor evaluate the Company's nor can we determine whether the present contract is being properly applied.

It would be most appreciated if this information could be made available by February 16, 1959.

The Respondent replied to the foregoing requests by letter of February 27, 1959, as follows:

Dear Mr. Dion:

This is in reply to your letter dated February 3, 1959 in which you request certain data concerning employees of the Pratt & Whitney Aircraft Division of United Aircraft Corporation.

We wish to point out that the subject of the Company supplying or making available to the Union detailed information concerning employees was the subject of negotiations which preceded the execution of the current contract between the Company and the Union entered into on December 5, 1957 to expire no earlier than December 4, 1959.

Pursuant to these negotiations, the Company and the Union agreed in Section 6 of Article VII of the contract that a list would be prepared showing the seniority of the employees each six months and a copy of such list would be given to the Union. Likewise, in Section 14 of Article VI of the contract, the Company agreed to make available to the Union at quarterly intervals, records disclosing the names of employees in the bargaining unit who in the previous calendar quarter have received an increase in the base rate as a result of performance rating. It was agreed that these records, to be made available, would reveal the name, department number, job code, previous base rate, new base rate and rating of such employees. In addition, the Company agreed to produce certain records for the Union's inspection in connection with Step 3 of Section 2, Article V, of the contract. Section 11 of Article was also designed to provide the Union with information concerning new or changed jobs.

We also direct your attention to Section 3 of Article XII of the contract. We interpret this Section to constitute an understanding between the parties that the contract, as agreed upon, settled all demands of the union during the life of the agreement.

We have, of course, always recognized the Union's right to have access to information concerning the employees it represents to assist it in bargaining and in assuring itself that all concerned are complying with the provisions of the contract. We assume, however, that this problem was one of the many which was settled in negotiations culminating in the current contract between the Union and the Company. If this assumption is not correct, then we can see little or no purpose in such contractual provisions.

Under the circumstances as set forth above, we suggest that you rely upon the information which is available to you under the current contract or has been furnished to you in the past.

By a "JOINT IAM-UAW RELEASE" on May 9, 1959, it was announced that a Joint IAM-UAW Conference had been organized in Washington, D. C., for the purposes hereinafter explained by co-chairman of the Conference as follows:

We are today mobilizing all the resources and skill of our two great unions to bring to bear on United Aircraft Corp. and its Pratt & Whitney, Sikorsky and Hamilton Standard divisions, the maximum effective bargaining pressure. We have pledged to one another full cooperation and wholehearted support in whatever problems arise with this Company. Our only purpose is to win justice and humanitarian treatment for all workers of United Aircraft.

• • • •

Solidarity of the IAM and the UAW in their bargaining efforts on behalf of aircraft employees, has been growing steadily since 1953. The two unions have developed a relationship of mutual trust and respect as a result of the common problems shared by the members of the two organizations.

For the information of the joint membership of both Unions it was pointed out as significant information that (1) Lodge 1746 IAM Pratt and Whitney Contract expire on December 4, 1959; that (2) Local 877 UAW Sikorsky Contract expires February 15, 1960; that (3) Lodge 743 IAM Hamilton Standard Contracts expire April 21, 1960; that (4) Local 1234 UAW North Haven Contract expires May 15, 1960 and that this is the time for all to band together and fight for the common good of all instead of cutting each other's throat.

Thereupon, International Association of Machinists and United Automobile Workers of America through their respective local lodges, representing collective bargaining units at the several division plants of United Aircraft Corporation, jointly launched their so-called Unity Program demanding similar objectives, terms and conditions in all future contracts with United Aircraft Corporation. This joint organizational campaign was characterized by increasing demands for union security, full arbitration of grievances, improved insurance and pension benefits, greater seniority rights by automatic progression, and more substantial holiday and vacation pay. Unity Program buttons were distributed, and all members of the Union were urged to wear them at all times to indicate solidarity in making identical demands for each separate bargaining unit.

In a somewhat lengthy letter dated October 27, 1959, the president of Lodge No. 1746, fully explained to its membership the bargaining situation and demands being made upon United Aircraft Corporation for changes to be made in a new collective-bargaining agreement to replace the contract expiring on December 4, 1959, as follows:¹

¹ It should be noted that no mention whatever is made concerning alleged failure or refusal of the Company to furnish information to the Union.

October 27, 1959

Dear Member:

On the eve of the commencement of our negotiations with the Company for a new collective bargaining agreement I would like to have the chance, through this letter, to better acquaint you with the contract proposals which we have made to the Company and to tell you why we feel that it is necessary that such changes be made in our agreement.

You, as I, have seen the many changes that have come about within the plant—we have seen the transition from the radial engines to the jets—and we have seen the dislocation which this change brought with it. Today, we both look ahead with apprehension to even more drastic changes and I am sure that you, as I, are well aware that these changes have a way of leaving disruption and heartaches in their wake, for the labor needs of the future have not always been filled from the ranks of those who were fitted for the work of the past—progress—though necessary, can sometimes be brutal.

We surely stand at the very door-step of a great tomorrow and your Union wants to make it not only possible, but probable, that there will be a place for us in the work of tomorrow. You and I cannot do this individually—we can do it as a united labor group.

So, if you will bear with me through this rather long letter, you will have not only a good understanding of what we seek as a Union, but why we seek it.

The cutbacks during the past two years, with the resulting dislocation, transfers and downgradings which usually follow, has caused your Union to seek the following clause:

When a job classification is discontinued or so modified as to result in the elimination or reduction of a recognized occupational group in a given seniority area, the employees regularly assigned to such group will be transferred to other jobs in the same labor grade in comparable occupational groups in the plant on the basis of seniority and demonstrated ability.

This is a clause which your union was able to negotiate into a previous agreement but which the company refused to continue in the contract. You may remember that it was this very clause that served our members so well during the periods when the Company was opening branch plants and was attempting to compel the East Hartford Pratt and Whitney workers to accept permanent transfers to jobs in other areas.

The union is proposing too that senior employees shall have the option to accept shift transfer to fill any vacancies and that transfers and loan out be offered to employees on the basis of their seniority.

In order to effect the training of today's workers for tomorrow's jobs, the Union is asking that openings for job training shall be offered on the basis of seniority and that if a trainee, selected from the bargaining unit, fails in the training program he shall be returned to his former job or a comparable one so that he will not find himself with no job at all.

The Union is asking too, that supervisors not be permitted to engage in work normally performed by employees in the bargaining unit. This will stop the practice of supervisors performing bargaining unit work during the overtime days of Saturday and Sunday.

And while we're discussing the provisions connected with seniority, the Union seeks to remove the clause

from the contract which permits the Company to retain 10% of an occupational group in a seniority area regardless of the seniority of the employee. It further asks that the clause releasing the Company from liability for a period of 10 days in the event that an error is made in laying off by seniority, be removed from the contract. The 10% clause has not been used by the Company at the East Hartford Pratt & Whitney Division but it has been used by another division of the UAC and the Union wants it out of our contract lest senior employees find themselves on the street while less senior workers hold their jobs.

The Employee Performance Rating Plan by which our members progress through classifications of the labor grades toward that "exalted" and rather rare position of "top" money, has long been a subject of negotiation between the Company and the Union. The Union feels that a system, which frequently cannot be intelligently explained by an employee's foreman, is not a good or desirable way to evaluate a worker's performance. The Union asks that this plan be done away with and a plan of progression which becomes automatic in a given period of time be substituted. There are far too many instances where old time employees have failed to receive increases over long periods of time. While this undoubtedly adds to the low cost operation of a department, it causes a worker to feel that no recognition has been given for long years of good work.

The Union has asked that the shift differential for 2nd shift workers be increased to 10%. There can be no question but that workers who spend years of their working life employed on second shift work must sacrifice many things which employees on other shifts enjoy, both from the stand point of home-life with a family and recreational activities.

The Union asks that all employees in the bargaining unit receive a 15¢ across the board increase.

There is good reasoning behind the requested change in the vacation plan which your Union asks—3 weeks after 10 years. A good proportion of the agreements being negotiated now, give three weeks vacation for periods of employment under 15 years—as our present agreement now gives us. We trust that a Company that is forward enough to lead the field in modernization of their retirement plan by the inclusion of a cost of living escalator factor, will not long stay behind the industry in the matter of liberalizing their vacation plan.

And on the matter of vacations, the Union is asking too, that if an employee is retiring or is unfortunate enough to be laid off, that he receives a pro-rata vacation payment.

To those of us who are still in our early years, the Union's request that the Company provide a \$2,000 paid up Life Insurance to those retirees who qualify for pension will not seem too important. However, to those who are approaching that time of life and who are now wondering if the combination of their Social Security and Retirement Annuity benefits are going to permit them to carry on, it will doubtlessly seem the most important item on the Union's list of proposals. It is a most difficult situation when one has to leave a job one has held year after year with a steady income and be faced with the necessity of revamping his entire way of life to meet the reduced income that retirement provides. It too, often happens that there just is not sufficient revenue to meet everyday needs and still continue adequate insurance that was so easy to maintain during the working years.

If each of us were to ask ourselves how able we would be to continue in force the insurance policy provided in our agreement in the event we were to leave our present employment and take work in a plant that was not covered by a contract carrying negotiated insurance, we would be better able to realize the importance of this proposal. The Union does not believe that this proposal for this amount of protection for the families of our retired employees is unreasonable—we believe that it is one of the most important areas for discussion during these negotiations.

A great many contract with Aircraft companies contain provisions for paid funeral leave for stated number of days in the event of a death in the immediate family. Your Union is presenting this proposal this year to the Company. Though many of the contracts which have been negotiated with other companies carry up to five days paid leave, our proposal asks for a paid leave of three days only.

And now I would like to discuss an area of our negotiation that at first glance may not seem important to the member since it does not result in any increase in wages, vacations or monetary gain. This is the area of service by your Union through its representatives in the shop and in the Local Lodge.

Your Union exists for the purpose of helping you with the everyday problems that you encounter in your work in the plant. Every restriction that is placed on the ability of the Union representative to investigate and handle your grievance problem must sooner or later affect each and every employee. During years past we have experienced difficulty in making certain that every employee who had a grievance was able to obtain the service of his Union Steward.

This year the Union has submitted proposals that will insure that any employee having a grievance shall be guaranteed that the services of a Steward and further that the Steward shall have the right to investigate the grievance on Company time. To assist the Steward in this, the Union asks that the employee records, which in the past have been available at Step 3 of the procedure, now be made available at Step 1. As a union we fail to understand why a grievance, which could by the records be settled at Step 1, must await Step 3 before settlement can be made.

Our present contract spells out the types of cases on which the Union can compel arbitration. This year the Union asks that a clause be placed in the new agreement which will provide that all unresolved grievances at Step 4 of the grievance procedure may, at the request of either party, be submitted to arbitration.

We further propose that the present contract restriction that an arbitrator's award shall not be retroactive beyond the date of the filing of the grievance in writing, be removed from the contract. We feel that if the injustice which the arbitrator corrected was present before the grievance was filed, the settlement should encompass the entire period during which the employee suffered the injustice.

The last item I would like to discuss is our proposal for a Union Shop. You, on many occasions complained to us that those who are not in the Union are benefiting by the efforts of the Union members and that you do not believe this to be right.

A Union Shop at Pratt & Whitney will insure that all who benefit will be a part of the Union.

Last month a new bill called the "Labor-Management Reporting and Disclosure Act of 1959" was signed into law by the President marking the end of

a nation wide movement by the foes of labor to place restrictions on labor Unions.

A recent copy of "The Machinist" carried the full text of this new law which should be read by every Union member in our country. The full impact of the law will not be realized until the act has been in effect for a period of time and the true meaning of the bill has been interpreted by the courts.

Next month you will nominate the candidates for office in your Union. Every member should plan to attend the monthly meetings of his Union at the Machinist Building, 357 Main St., East Hartford, on November 1st, (11:00 a.m.) and November 22nd, (1:00 p.m.) at which time nominations for office will be made.

The election of officers for your union will be held at the Machinist Building on the 9th of December. The voting will start at 6:00 a.m. and the polls will remain open until 6:00 p.m. so that workers on all shifts will have had an opportunity to vote. I urge that you attend the nominating meetings and that you cast your vote for your choice of officers on December 9th, either in person or, if you qualify under the International Constitution, by absentee ballot.

Let me say "thank you" for your patience in reading this lengthy letter. I hope that it will help you understand the problems which your Union seeks to correct through negotiations with the Company—I would like to think too, that as a result of this better understanding, you will help us in our efforts to bring all the workers at Pratt & Whitney into the Union so that we all may benefit through our United action.

With every good wish for the future, I am

Fraternally yours,

DAVID FRASER
President

Thereafter, the negotiating committees of the Union and the Company met and bargained with each other on October 29, November 4, 11, 12, 17, 20, 24, and 25, 1959 without reaching a complete agreement, until finally at approximately 4:00 a.m. on December 3, 1959, written proposals were jointly prepared by the negotiating parties for recommendation and submission to vote of the membership of Lodge 1746, as follows:

The present contract dated December 5, 1957, will be amended or clarified where necessary, to reflect the following agreement of the parties:

1. An employee eligible for holiday pay who works on the holiday will be paid holiday pay, and, in addition, time and one-half his regular base hourly wage rate for all hours worked on the holiday.
2. The amount of group life insurance available to hourly-rated employees will be increased from \$4,000 to \$5,000. The cost of such insurance will be paid for as at present.
3. The company as an element of its insurance program is now studying the question of providing life insurance for retired employees. Further discussions on this matter will be had by the parties as soon as the company's study is completed.
4. The present grievance procedure providing that only employees may file grievances relating to their own wages, hours, and working conditions, will be amended to permit shop stewards to file grievances alleging that a foreman has improperly refused to call the steward at the request of an employee in the steward's area for the purpose of assisting that employee in the handling of a grievance.
5. The Chief Personnel Advisor will be required to give his disposition of an Hourly Job Rating Plan

grievance within thirty (30) days of the date on which the union notifies him in writing that it has completed its submission of facts relating to the grievance.

6. For all purposes, other than layoff, the seniority rights of members of the union shop committee, the president, vice-president, recording secretary, financial secretary, treasurer, sentinel, conductor and three (3) trustees of the union, if employees, and union stewards, shall be exactly the same as the seniority rights of all other employees except as provided below.

- (a) In the case of layoff, and for the sole purpose of maintaining union representation of the time of the union shop committee, the president, vice-president, recording secretary, financial secretary, treasurer, sentinel, and three (3) trustees of the union, if employees, shall, during their term of office, head the seniority list in their occupational group, and will not be laid off until all other employees in their labor grade (or lower labor grades) in their respective occupational groups, have been laid off.

- (b) In the case of layoff, and for the sole purpose of maintaining union representation at the time of layoff, a union shop steward shall, during his term of office, head the seniority list in his occupational group, in his steward area, and on his respective shift, and will not be laid off until all other employees in his labor grade (or lower labor grades) in his occupational group, in his steward area, and on his shift, have been laid off.

- (c) A union shop committeeman or union shop steward will not be transferred or promoted to a job out side of his committeeman or steward area unless he notifies the company in writing that he wishes to be considered for such a job during which time he shall maintain his position as a committeeman or steward; or unless there is no job of the same or lower grade in his occupational group in such area which he is qualified to perform; or except in the case of an emergency; or unless his department is being transferred to another location outside such area.

7. The following additional matters shall be subject to arbitration:

10. A grievance by an employee alleging that he was not promoted to a particular job in violation of the provisions of Section 9 of Article VII. This, however, shall not apply in the case of promotions to leadmen's jobs.

11. A grievance by an employee alleging that the company failed to comply with the provisions of Section 1 of Article VI with respect to the payment of an overtime rate for work performed by him.

12. A grievance by an employee alleging that the company failed to comply with the provisions of Section 2 of Article VI with respect payment of a second or third shift premium for work performed by him.

13. A grievance by an employee alleging that the company failed to comply with the provisions of Section 4 of Article VI.

14. A grievance by an employee alleging that the company failed to comply with the provisions of Section 5 of Article VI with respect to work performed by him.
15. A grievance by an employee alleging that the company failed to comply with the provisions of Section 6 of Article VI with respect to work performed by him.
16. A grievance by an employee alleging that he did not receive pay for a holiday not worked as provided in Article VI, Section 8.
17. A grievance by an employee alleging that the company violated the provisions of Article VIII, Section 2, by not paying him the proper vacation pay allowance under the provisions of Article VIII.
18. A grievance by an employee alleging that the company improperly invoked the provisions of Article X, Section 3(b), in terminating his employment.
19. A grievance by a female employee alleging that the company failed to credit her with the length of continuous service which she had on the date of her termination for gravida as provided by Article X, Section 3(c).
8. The Company will make available to the Chairman of the Shop Committee a list of the names of laid-off employees who exercised their right of recall.
9. The witnesseth clause of the present contract shall be changed so as to read as follows:

It is the intent and purpose of the parties hereto that this agreement promote and improve the industrial and economic status of the parties, provide

orderly collective bargaining relations between the company and the union, and secure a prompt and fair disposition of grievances so as to eliminate interruptions of work and interferences with the efficient operation of the company's business.

It is recognized that in addition to other functions and responsibilities, the company has and will retain the sole right and responsibility to direct the operations of the company and in this connection to determine the number and location of its plants; the product to be manufactured; the types of work to be performed; the assignment of all work to employees or other persons; the schedules of production; shift schedules and hours of work; the methods, processes, and means of manufacturing; and to select, hire, and demote employees, including the right to make and apply rules and regulations for production and safety.

It shall also have the right and responsibility to discharge or otherwise discipline any employee for just cause, to promote and transfer and to lay off because of lack of work or other cause, unless otherwise hereinafter provided.

10. The records described in paragraph 2 of Step 3 (a) of Article IV, Section 2, of the current contract will be made available at Step 2 of the grievance procedure rather than Step 3.
11. Appendix 'A' will be revised so as to reflect the general increases in base hourly wage rates as agreed upon.
12. An employee who would have been eligible for holiday pay under these provisions except that he failed to meet the eligibility rules and conditions set forth in subparagraph (a) above solely because he was required, as a member of the National

Guard or as a reserve member of one of the United States armed forces, to be absent from work for the purposes of summer training or summer encampment for a period of not less than one (1) week nor more than two (2) weeks shall nevertheless be entitled to the holiday pay which he would have received had he been working on his regularly scheduled job during such absence.

13. The duration of the contract will be for a period of two (2) years from December 3, 1959. The contract may be reopened once on December 4, 1960, for the purpose only of negotiating a change in base hourly wage rates.
14. All of the foregoing is contingent upon agreement by the union negotiating committee that it will recommend ratification of such proposals to the union membership and upon ratification of such proposals by the membership.
15. Although the contract is not to be revised in this respect, union officers and delegates will be excused for no less than a full shift (unless otherwise agreed to) upon written application by a designated representative of the union for attendance at union meetings for which the company has granted excused absences in the past and, in addition, attendance at a union-sponsored school.

signed Dave Fraser (E. H. Pres.)
 Frank DeLuco (South Pres.)
 Esidor Linder (Chairman)
 John Main (Sr. Bus. Agent)

signed Morse for Co.

At shift meetings on December 3, 1959, the jointly negotiated proposals recommended to its membership by the

Union negotiating committee was accepted by the bargaining units in plants at Meriden and Southington, Connecticut, but was rejected by combined units from the East Hartford and Manchester plants of the Pratt and Whitney Division. It is now contended by counsel for the General Counsel and the Charging Party that the negotiating committee for the Respondent engaged in an unfair labor practice by insisting as a condition of this agreement that the Union negotiating committee recommend acceptance and ratification by the membership of Lodge No. 1746. Following rejection by the membership of the agreement recommended by its negotiating committee, the Union issued a public release explaining such rejection, as follows:

RELEASE

On December 3rd, 1959, Lodge 1746 negotiating committee presented to its membership, the proposals negotiated in ten bargaining sessions with the management of the Pratt & Whitney Aircraft Division of the United Aircraft Corporation. These proposals included monetary gains of a 7 to 12 cent per hour wage increase and an agreement on the part of the company to pay employees time and one half in addition to holiday pay for time worked on such holidays.

Many people are today asking why the membership of Lodge 1746 turned down this proposed settlement offer of the company and sent their negotiating committee back into negotiations on the original Union proposals.

At the first meeting with the Company they stated that they were not in a position this year to grant their employees more than the 3¢ per hour which was the amount of the increase in the Cost of Living as shown by the index of the Bureau of Labor Statistics. The Union on this first day replied that though they sought a 15¢ per hour wage increase for all employees in the

bargaining unit—they were just as concerned this year with contract clauses which would give security on the job to the workers at Pratt & Whitney—that the emphasis was on the non-economic issues.

It was the inability of the Negotiating Committee to bring back such contract clauses, coupled by the attempt on the part of the management of Pratt & Whitney to further reduce the security of employees by changes in the established occupational groupings in which all employees hold their seniority for purposes of layoff and recall and the Company's adamant position on the corrections proposed by the Union in the Grievance procedure that resulted in the rejection by the membership of the Company's offer. Nor would the membership of Lodge 1746 agree to language in the new contract that would permit the company to assign the work which they have done over the years to other persons.

As these items are explained the reasons for the memberships rejection will become very clear.

The vast sprawling East Hartford plant is divided into seniority areas and each employee holds his seniority for the purpose of layoff and recall in his occupational group in that seniority area. Therefore at time of lay-off, all the workers in a given occupational group are pooled together in that seniority area and the least senior employee is the one subject to layoff. The employees have held their seniority in this manner for many years and over many contracts. They know pretty clearly where they stand in the seniority standing and on this information they have planned their lives and those of their families and felt secure in their jobs.

At these negotiations the Company proposed that the occupational groupings for seniority purposes be changed—that certain groups be divided and that cer-

tain other groups be formed. This can best be explained perhaps by the attempt by the company to divide the occupational group in which all electricians now hold their seniority. The company proposed that they become two occupational groups, one to be of the maintenance electricians and the other of the construction electricians. You may be sure that the electricians who attended the ratification meetings were loud in their protest against this division of the occupational group and the lessening of their seniority.

The company also proposed that the seniority areas be changed by removing from the established areas some of the people now covered. This too met with objection by those who had held their seniority by the combination of these areas. When a company proposal aims straight at the job security of certain employees, these employees and others who may rightly fear that the next division could affect them, are bound to make serious objection to the change.

During the discussions on the seniority provisions in the contract protecting the workers the company stated that because of an arbitrators decision in one of the Divisions of United Aircraft, the present contract now gave them the right to lay-off by occupational group from within seniority areas and instead of recalling that employee on the basis of the seniority that he held for recall to his job, they had the right to transfer into that job from any seniority area or occupational group as long as the employee so transferred had more overall seniority than the employee who was on layoff awaiting recall.

The basis of recall in the past has been on the same seniority that caused the man to be laid-off—this Union could not agree that a man who was awaiting recall to his job could have his recall rights negated by the transfer by the company to another man into his job.

The union has proposed that all areas of the plant be combined into one seniority area and that all occupational groups be combined for the purpose of seniority in lay-off and recall. This the company does not want to accept. The Union is trying to improve the security of its members—the company proposal tends to reduce that security.

One of the company proposals drew the ire of all members from all areas. The Union now has in its agreement a clause which states that overtime shall be equally distributed among the employees who normally work on these jobs in that department. It has been a matter of grievance by the Union that despite that contract clause, the company is utilizing its supervisory personnel to do overtime work. At this negotiating session the company introduced a proposal which would give them the unhindered right not only to assign foremen to the work done by the bargaining unit, but also to remove work now done by employees and claim it as part of salary or technical work.

It may sound strange to many but a worker at Pratt & Whitney could have a deal of trouble in getting the service of his Union Steward in case he had a grievance. This right, though usually undisputed in other corporations, has given the workers and the Union trouble at this plant. The Union asked for a guarantee that any employee having a grievance be guaranteed the services of his Steward. The company offered not a solution but a remedy—they still maintained that the company would still determine whether or not grievance existed and refused to give employees and the Union a guarantee that any employee having a grievance would receive the service of a Steward. The Union asked too that the Stewards have the right to investigate grievances at the point where they occur by talking with such other employees in the area as

might have knowledge of the matter but the company would not entertain this nor would they make the records so important to the just settlement of a grievance available as Step 1 of the procedure. Such records in the old contract were available at the 3rd step and the correction by the company to the degree that they will be available at Step 2 leaves a lengthy period between the Step 1 of the grievance, where the case should be settled on the basis of the fact, and Step 2 of the procedure.

The Union asked that all unresolved grievances be submitted to arbitration at the request of either party. This the company would not do—instead they added ten areas of compulsory arbitration, including disputes on promotional grievances, the remaining nine were not of a nature where they would be of great value to the employees since they covered items which are not often subject of grievances.

Perhaps the one area of mutual discontent is with the company's Employee Performance Rating Plan. The Union during many negotiations in the past has asked that this plan be superceded by a system of automatic progression so that the employee would automatically, over a given period of time, progress to the top rate range in his pay classifications of his labor grade. The Union has pointed out many times that too few of the Pratt & Whitney employees ever reach the premium or the top rate pay classification of their labor grade. The company itself has pointed out that the standards upon which every employee is judged are standards which each individual foreman may have set in his mind for the required work. The Union does not believe that a system which cannot be properly explained to the employee is a fair and just way to grade a man's performance or determine his chances for movement to the higher pay classifications of the labor grade. This

merit rating system has also presented another problem to the union in servicing its membership. The company, in the past, has often used an individuals merit rating to justify promotion and termination.

The man who worked during the hours from 3:30 to midnight each day must, in the doing, sacrifice a great deal of the time he would spend with his family. Children do not see too much of dad who has to work those hours—he's not with them during the evening hours when school is done and he's pretty likely to be sleeping when the youngsters leave for school in the morning. The Union proposed that employees who work the second shift should be given a shift differential of 10% instead of the 12¢ per hour they now receive. The company denied this request.

There has been a clause in the contract which permits the company at time of lay off to retain out of seniority 10% of the total number of employees in any occupational group in a seniority area. The membership of Lodge 1746 is insistant that this clause be removed from the contract though to date it has not been a problem with the membership as it has not been used by the company at Pratt & Whitney. The membership feels that this is a threat to any employee's individual security.

The membership is also insistant on the removal from the contract of a 10 day release from financial liability on the part of the company in the event that an error is made in the selection of the lease senior employees in an occupational group and seniority area to be laid off.

The union has requested a list of all employees who leave the bargaining unit showing the reason for such leaving. The company would not move on this one. Over the years this has been a problem to the Union as

the only notice we receive when an employee is removed from check-off is "Terminated". The employee might be temporarily transferred into a training course, he may have resigned or have been terminated, or he may have died. The Union has been embarrassed in the past when a member having been transferred back into the unit from school has been dropped from membership because of lack of information. It also results in the loss of accrued Death Benefits by the member.

The Union had requested in its proposals that the company bring its vacation plan up to a par with other major corporations. It pointed out to the company in negotiations that employees in aircraft plants in this immediate area were participating in a far better vacation plan than the one at United Aircraft. The Union pointed out that the United Aircraft Corporation had been a leader in granting 3 weeks after 15 years of service. Over the years, in the absence of any improvements, they have fallen behind the industry since 3 weeks after 10 or 12 years now prevails. The company flatly refused to change the present plant and denied a request in the union proposals that employees retiring or being laid off be given a pro rata vacation payment. They gave as reasons for the above, 1. Vacation was not an earned benefit, but rather a gift from the company. 2. Retired or laid off employees received unemployment compensation to which the company contributed. They stated that they were not going to pay them twice.

From December 11, 1959, until the strike began in June 1960, Lodge No. 1746 requested no further meeting with company representatives, although subsequent meetings were arranged by the federal and state mediation services that did not result in any confrontation between the parties.

Concurrently with negotiations between Lodge No. 1746 and the Pratt and Whitney Division, Lodge No. 743 kept its own membership at the Hamilton Standard Division fully informed as to what was going on by issuing fliers emphasizing and discussing the issues proposed and published by the Steering Committee of the Joint Unity Program. After the Pratt and Whitney contract expired on December 4, 1959, and the membership of Lodge No. 1746 had rejected the new contract proposals recommended by its negotiating committee, Lodge No. 743 made an announcement to its membership, as follows:

Soon, you at Hamilton will get your chance. Negotiations are just around the corner. Now is the time to think positive and once for all stand firm for a contract which we will be proud of.

Your final chance to show the Company that you mean business and this is the year to join with all other union members at East Hartford, North Haven and Sikorsky and wear the Unity Button. Today, January 15, [1960] is "B" day at all plants who are either in negotiations or will be going in shortly.

In another flier distributed on February 22, 1960, Lodge No. 743 announced that the membership of Local 877—UAW at the Sikorsky Division of United Aircraft Corporation had rejected all company proposals in a mass meeting held in the Loew's Poli Theatre in Bridgeport, Connecticut, and exhorted its own membership, as follows:

The time is drawing near for we who believe in full protection to stand up and be counted. You will be called upon to make this choice, so get the true facts and evaluate them carefully. Talk it over with your fellow employees. Get that non-union employee off your back and fighting beside you. Let's not kid each other, this is War, not a cold war but a hot one.

In the same manner that January 15, 1960, was designated by Lodge No. 1746 as "B"-Day to wear the Unity Buttons in celebration of the rejection of a new contract with the Pratt and Whitney Division, Lodge No. 743 now designated Tuesday, February 23, 1960, as "Tag Day" in all divisions of United Aircraft Corporation to wear the Unity Button with a tag attached to salute Local 877—UAW for rejecting a new contract at the Sikorsky Division in Bridgeport, Connecticut, except on terms and conditions proposed by the Steering Committee of the Joint Unity Program. Thereafter, on April 20, 1960, similar action was taken by the membership of Lodge No. 743 by rejecting final company proposals for new contracts at the Hamilton Standard Division. Current contracts at the Broad Brook and Windsor Locks plants of the Hamilton Standard Division expired at midnight on April 21, 1960. Thereafter, on May 10, 1960, the IAM-UAW Joint Unity Committee distributed a leaflet sponsoring a mass demonstration to hear an address to be delivered by IAM President Al Hayes at the Bushnell Auditorium in Hartford, Connecticut, on May 22, 1960. Union members working at all United Aircraft plants were urged to participate; and this flier contained the following prediction:

ONLY 5 DAYS TO GO

Negotiations between UAW Local 1234 and Pratt & Whitney North Haven plant are coming down the stretch. In 5 more days the last major contract will expire unless the company makes a realistic contract offer. In all likelihood, after May 15th we will be able to report "4 down, None to go." The cycle would be complete. WATCH ALL LEAFLETS FOR IMPORTANT ANNOUNCEMENTS IN THE DAYS AHEAD.

On May 13, 1960, Lodge No. 743 distributed a leaflet calling for a meeting of all picket captains on Sunday, May 15th, at the District 91 office, to be instructed in their strike

duties by an expert assigned by the Grand Lodge; and it was further noted therein that the North Haven UAW contract expires this weekend. On May 16, 1960, another leaflet reported that Local No. 1234-UAW, had unanimously rejected the proposed contract at North Haven, and buried with it the company hope of driving a wedge into the IAM-UAW Joint Unity Program; that about 500 gate picket captains from IAM Lodges Nos. 1746 and 743 had been instructed in strike duties; and in the name of the IAM-UAW Joint Unity Committee announced dates for a strike vote to be taken on May 22nd at UAW Locals, and on May 23rd at IAM Lodges, following the mass demonstration and address of IAM President Al Hayes at the Bushnell Auditorium in Hartford. All major locals and lodges now working without contracts requested their members to stand up and give approval of strike action, reciting that "ALL MAJOR UNIONS AT UNITED AIRCRAFT ARE READY TO MOVE TOGETHER—THIS IS THE FIRST TIME IN HISTORY THE COMPANY HAS ITS BACK TO THE WALL—YOU PUT IT THERE—KEEP IT PINNED TO THE WALL UNTIL THE COMPANY DROPS ITS MODEL-T POLICIES AND GRANTS ALL WORKERS AND THEIR FAMILIES GENUINE SECURITY."

On May 17, 1960, Lodge No. 743 by the distribution of leaflets publicized its demands on the Company, as follows:

FOR THESE, WE FIGHT IF NECESSARY

- A contract guaranteeing the right of stewards to investigate grievances with access to the records.
- All unresolved grievances to be subject to arbitration by a neutral third party.
- An end to the apple-polishing merit system with an automatic raise plan to replace merit. Every employee will then reach the top rate of pay automatically.

- When jobs are discontinued, employees to be transferred to other jobs on a seniority basis.
- Expand recall rights so an employee with up to 3 years service has right to recall for 1 year; those with 3 or more years service will have recall rights for 2 years.
- All employees must share in the rights and responsibilities of union membership.
- Remove the restrictions from holiday pay eligibility.
- Shift transfers to be made on the basis of seniority within departments.
- Promotions to be made on basis of seniority within departments.
- Employees to retain seniority in old department for 60 days after transfer.
- Employees outside of bargaining unit, who have never been in the bargaining unit before to have seniority start at new employees.
- Improved vacations; 3 days paid funeral leave; pro-rata vacation allowance for laid off and retired workers.

In an avowed effort to avert a strike, the Respondent, Hamilton Standard Division, on May 18, 1960, distributed a letter addressed "To All Hamilton Standard Employees," stating its position, as follows:

To All Hamilton Standard Employees

The peaceful relations that have existed for the past 14 years between Hamilton Standard and Lodge 743, I.A.M., may be broken this year as a result of the present dispute between the company and the union.

For the first time since the costly strike of 1946, employees of Hamilton Standard who are members of the union have been asked to decide whether or not to authorize a strike against our division.

This is a matter of grave concern to all of us at Hamilton Standard—not only because a strike could bring hardship to many people, but because it could seriously affect the business prospects of the division. For these reasons, I believe it important that you and your family know the full facts of our negotiations with the union and understand what lies behind the threatened strike.

The record of our negotiations with the union, frankly, is disappointing. It is public knowledge that Lodge 743 is involved in the so-called Unity Program devised by I.A.M. and U.A.W. leaders to pressure the company into agreeing to their demands. The Hamilton Standard management, at the very outset of negotiations, asked the union negotiating committee if it had any prearranged commitments to other unions which would restrict its freedom to make an agreement with us.

The union negotiating committee, through its spokesman, answered that it was free to negotiate independently; that it was interested solely in the welfare of Hamilton Standard employees; and that problems existing between the company and other unions and other divisions of United Aircraft Corporation did not concern it.

On the basis of these assurances, Hamilton Standard's representatives proceeded in good faith to attempt to negotiate a new agreement with Lodge 743. It is now clear that the union negotiating committee was either mistaken in the assurances it gave the company or deliberately misled the company representatives.

During negotiations, representatives of the company made a complete contract offer to the union which included the following:

1. Wage increases ranging from 7¢ to 12¢ an hour.
Hamilton Standard's wage rates, with these increases, will continue to be well above the rates paid by other companies in this area for similar work.
2. Double time and one-half for work performed on holidays. Under this proposal an employee who works on a holiday will be paid holiday pay and, in addition, will be paid time and one-half for all hours worked on the holiday.
3. An increase in the amount of group insurance available to employees. The company proposed to raise the amount of group life insurance from \$4,000 to \$5,000 under the present cost-sharing agreement. This proposal would permit an employee to increase his group life insurance coverage \$1,000 at the cost of about 7¢ a week. The company also told the union it had, under study, plans concerning group life insurance for retired employees. It offered to discuss this subject again when the study was completed.
4. Holiday pay for employees absent from work because of attendance at a summer camp or training as members of a National Guard unit or the organized Reserve.
5. A substantially increased number of matters subject to compulsory arbitration.
6. New provisions governing the wage rate to be paid employees in certain cases of transfer from lower-rated to higher-rates jobs, and vice versa.
7. Improved seniority provisions governing layoff, recall, and promotion.

The company's representatives were told by the union negotiating committee that seniority was the most important single demand involved in the negotiations. They were told that agreement had to be reached on this subject if the negotiations were to be successful.

Recognizing the importance of seniority to employees and the company alike, we negotiated a new and broader seniority system which the union told us would meet the problems that had arisen under our former contract.

The former contract provided that when layoffs were necessary, employees would be laid off and recalled by departments in accordance with their seniority and demonstrated ability.

The company offered to broaden this clause substantially by combining most departments in Buildings #1 and #2 to enlarge the area in which an employee could exercise his seniority rights in the event of a layoff.

The company also agreed to make other important changes in the existing seniority provisions. It agreed to establish new plant areas from which employees would be selected for promotion.

It also agreed to the union's proposal that we drop the previous contract provisions giving management the right to retain, regardless of seniority, 10% of the employees in a department affected by layoff.

These were important concessions. Most people feel that when a company goes halfway in meeting a union's demands it is being fair and reasonable. In this case, the company went far beyond the halfway mark—it agreed to about 90% of the unions proposed changes on seniority. This has been admitted publicly by the union.

In addition to the above, the company proposed to make certain other modifications and improvements in the terms of the former agreement.

It is my firm conviction that the complete company offer was fair and reasonable. In the light of present conditions in the aircraft industry, and particularly in view of the efforts all of us at Hamilton Standard have been making to meet the problems created by changing defense technology and increasingly keen competition, the offer was a sincere attempt to satisfy the needs of employees.

No one has claimed that the company did not make a fair wage offer. Likewise, the company's offer on seniority seemed to remove it from the area of dispute. Even the officials of Lodge 743 admit these things.

At the union meeting held on April 20 the leaders of the union recommended that the offer be rejected. Looking back now, it appears that the union leaders did not at any time have a serious intention of reaching an agreement with the company. It is clear that unless the company agreed to those particular demands which had been devised by Lodge 743 in conjunction with other unions to increase the union's power over Hamilton Standard and its employees, and reduce management's right to manage, no agreement could have been reached.

During negotiations we did not agree to these demands which include the unrestricted right of union stewards to investigate grievances on company time, compulsory unrestricted arbitration, automatic wage progression and compulsory union membership. *We will not agree to them under the threat of strike. And we will not agree to them if a strike actually occurs.*

Let me explain briefly why this is our position.

Investigation of Grievances on Company Time

The contract which expired April 21 provided that an employee who had a grievance could have the services of a steward if he so desired. It also gave stewards the right to attempt to adjust such a grievance with the employee's foreman and to attend a meeting, at the second step of the grievance procedure, with the representative of management and the union committeeman for that area. In the contract the company also agreed to pay stewards for the time spent in attendance at such meetings up to 2 hours per week. The company and the union agreed that the proper numbers of stewards was 27, including the Broad Brook plant.

The contract also provided that each of these stewards, regardless of his actual length of service, would be given artificial seniority so that, in effect, he would be exempt from any layoff in his department and on his shift.

One of the final demands of the union was that the company agree to permit stewards to investigate grievances on company time. If the company agreed to this demand, there would undoubtedly be serious disruptions of production and quite possibly confusion and friction among employees. The company, however, did tell the union that it would be willing to work out an arrangement to permit stewards to investigate grievances, so long as the investigations did not interfere with operations and provided the union paid for the time spent by the steward in making such investigation. This, I submit, is completely fair.

Compulsory Unrestricted Arbitration

The union has demanded that Hamilton Standard agree in advance to arbitrate all grievances and disagree-

ments regarding the terms of the contract. This is, in effect, a demand that the company sign a blank check and turn it over to some outsider to be filled in by him sometime in the future. Unrestricted arbitration means the company would have to agree in advance to give some stranger, with no knowledge of the company's problems or business and no responsibility for its successful operations, blanket authority to decide important matters which may affect its very existence and may endanger its ability to provide good jobs.

The management of Hamilton Standard is unalterably opposed to compulsory unrestricted arbitration. When I use the term "management", I'm not talking of some abstract thing which is unfamiliar to you—for in one way or another everyone is a "manager". The function of a manager is basically the same regardless of what is managed. Some of us manage a business. Almost all of us manage a home and a family. Some of us manage clubs for fraternal organizations, and some manage other activities such as P.T.A.'s and Boy Scout Troops.

Few, if any such managers would endorse a demand that some third party be given absolute authority in advance of a dispute to tell us how to run the affairs for which we are responsible. I doubt that you would agree to allow *your* decision on the affairs that *you* manage to be over-ridden by the veto of some stranger. This is the basic position of the company on this demand.

Let's look at the record and see just how badly Hamilton employees need this type of arbitration.

Hamilton Standard takes pride in the fact that it treats all employees fairly. In order to insure such fair treatment, we have agreed, and we will continue to agree, to provide for the maximum protection of each employee's job rights by agreeing to compulsory arbitra-

tion on all the essential matters that affect his employment.

In the recent negotiations we agreed to increase substantially the matters which could be made subject to compulsory arbitration.

If this offer were now in effect, any employee who believed that he had been unfairly dealt with on such things as discharge, disciplinary suspension, layoff, recall from layoff, promotion, shift assignment, overtime pay, premium pay, seniority, holiday pay, shift premium, distribution of over time, the rate range for a new or changed job, call-in pay, job classification, and other similar matters, could have an arbitrator rule on the question of whether or not the company had dealt with him fairly.

To this extent, Hamilton Standard is willing to have an outsider review its actions and reverse its decisions if he finds reason for doing so. In all these cases, however, the matter subject to arbitration is known in advance. There is no requirement that we sign a blank check.

In the past 10 years, during which many specific grievances were subject to arbitration, Lodge 743 took only 7 grievances to arbitration. I think this shows that Hamilton Standard has treated its employees fairly and that no need exists for the company to grant this demand for a blank arbitration check.

During the two-year period of the last contract, only two grievances went to arbitration. One of these involved a seniority question; the other involved discharge.

The company recognizes that on occasion a problem may arise which is not covered by the present arbitration offer described above. If this should occur, the

union is, of course, free to have it decided by our Connecticut courts or by the U.S. District Court in this State. These courts exist for the purpose of protecting the rights of Connecticut citizens and organizations, and they have established a notable record for impartiality and fairness.

The union has taken advantage of this right on several occasions during the past two years. In that period it appealed two cases to the state courts. One of these cases was subsequently withdrawn by the union in recognition of the fact that it was without merit and the other is still pending.

I think these facts establish clearly that the union's demand for unrestricted compulsory arbitration is not one which is needed for the protection of Hamilton employees.

Automatic Wage Progression

Any reasonable person will agree that there is only one basic way to get a wage increase—that is, to earn it. Some unions, however, have adopted a device called automatic wage progression which is the complete opposite of this principle.

Along with other reasonable people, we believe that wage increases can be paid only out of increased production and efficiency. Hamilton's wage system recognizes this basic fact and gears individual wages to individual wages to individual output and efficiency.

Automatic wage progression requires that all employees be given wage increases regularly and automatically until they reach the top of the rate range. The only requirement is the passage of time—a certain number of months must elapse before the next increase is forthcoming. So, increases are compulsory whether the individual has produced or not.

Every employer who had faced the realities of meeting a payroll is aware that wage rates must be related to individual ability and effort. Everyone knows that all employees are not the same, that their individual abilities and skills and their performance on the job differ. We believe that the company should be able to pay more money to an employee who does a better-than-satisfactory job than to one who does not do so good a job. We believe that we should be able to reward efficiency and above-average job performance. And we think Hamilton employees expect to be paid more money when they demonstrate that their efficiency and job performance warrant it. Our rate ranges and our wage structure are based upon these fundamental principles.

We have compared Hamilton Standard wage rates with the wages paid by other companies in the aircraft industry, including all of the companies which have automatic wage progression agreements with the I.A.M. This comparison shows that our wage rates equal or exceed those paid by the other companies. In practically all instances, the Hamilton "R" rate, and in many instances, the Hamilton "J" rate exceeds the top rate paid by most other aircraft companies. Hamilton Standard's rates compare even more favorably to the New England area in general.

The union has claimed that our rates are "paper rates"—that Hamilton employees do not get merit increases to the premium rates. As a matter of fact, well over one-half of all Hamilton Standard employees are paid rates in excess of the job rate.

Compulsory Union Membership

The union has demanded that the company agree to some form of compulsory union membership. This means that the company would have to force all its employees to join the union whether they wanted to

or not. It means further that the company would have to discharge an employee who after having joined the union changes his mind and decided he wanted to get out.

The company will not agree to such compulsion:

Consider for a moment how this would affect Hamilton Standard and its employees. After almost 19 years of union representation, approximately 5% of the eligible employees here have elected not to join the union. If the company agreed to the union's original demand for a union ship, it would be required to do either of two things: force 2,200 employees to join the union, or discharge all those who refuse to join it.

Under any form of so-call union security, the company would be required to exert some form of compulsion. It seems reasonable to assume that since the union has been unable to persuade Hamilton employees to join its ranks, it has decided it must get the company to do its job for it by forcing employees to become union members and to stay union members even against their will.

The management of Hamilton Standard firmly believes that it has no moral right to enter into an agreement with a labor union to force employees to become, or to remain, union members against their free will. In our opinion, the question of membership or non-membership in a union is a matter of individual choice and individual right. It is not a matter for majority rule.

Hamilton Standard could undoubtedly secure a peaceful settlement of this dispute for itself by agreeing to this demand. However, I assure you that under no circumstances will the company do this. Our plant is one of the places where an employee has the freedom to decide for himself whether or not he wishes to

join the union. We will not force anyone to pay tribute to a union for the right to work here.

Although there is no collective bargaining agreement now in effect, the company will continue to investigate and adjust any complaint or grievance which may arise out of your employment. I take pride in the fact that Hamilton Standard has always been a good place to work whether or not there is a union agreement in effect.

Like most of you, I sincerely hope that an agreement with the union can be reached so that we can all avoid the unhappiness that inevitably accompanies a dispute such as the present one. I would not be honest, however, if I did not tell you that I do not see any possibility of reaching such an agreement so long as the union officials continue to insist upon the demands which have led to the present stalemate.

I am sorry that this break in our relations with Lodge 743 has occurred. However, if the union calls a strike, our plants will remain open and work, which I urge you to accept will be provided for all employees.

Very truly yours,

HAMILTON STANDARD DIVISION

CHARLES M. KEARNS
General Manager

By leaflets dated May 24, 1960, Lodge No. 743—IAM announced that UAW locals at Sikorsky and North Haven and that IAM lodges at the Pratt and Whitney and Hamilton Standard Divisions had voted to strike; that the Strike Strategy Committee had been empowered to call a strike whenever it felt that it was the proper course to follow; and that Strike sanction had also been requested from the Grand Lodge. In the meantime, State and Federal

mediators called a meeting of the negotiating committees of the parties in an effort to reach an agreement on the issues involved; but the Union negotiators made it clear that no agreement could be reached unless the Company yielded on the basic issues of automatic progression, seniority, full arbitration, union shop, investigating grievances, etc. The same procedure occurred at meetings arranged with the UAW locals at the Sikorsky and North Haven plants. Letters were sent out to all members of the Union explaining the procedure to obtain strike benefits by registering at established Strike Headquarters; and requesting non-members to cooperate by remaining at home during the strike. Upon receipt of applications for strike sanctions, Fred H. Coonley, Vice President of the International Association of Machinists replied by telegram to the local Unions on June 2, 1960 (R-Exhibit 99D) stating that "Release of Sanction will be governed by top level agreement with UAW as of June 13th, "Vice President Coonley also sent a telegram on June 8, 1960 (R-Exhibit 99A), to John F. Main, Senior Business Representative of District 91, as follows:

Based on present developments in connection with Unity program with UAW dealing with the breakdown of negotiations with United Aircraft Corporation this is to advise that I am releasing strike sanction to Lodges 1746 and 743 covering all affected installations of United Aircraft Corporation as of 8 A.M. this date.

Sanctions letters sent to Lodges Nos. 1746 and 743 contained a postscript, as follows:

P.S. Consistent with our policy, Lodge 1746 [743] should not accept and sign an agreement with the company unless and until Lodge No. 743 [1746] has satisfactorily completed agreements with the Hamilton Standard Division [Pratt & Whitney Division] of the Company at Windsor Locks and Broad Brook, Con-

necticut [East Hartford, Connecticut]. Both agreements necessarily should bear the same expiration dates.

Pursuant to the foregoing grant and release of strike sanction, Lodges Nos. 1746 and 743 on June 8, 1960, began the strike and established picket lines at Respondent's Pratt & Whitney plants at East Hartford and Manchester, and at the Hamilton Standard plants at Windsor Locks and Broad Brook. Shortly before the picket lines were established, International Organizer Raymond Jutras addressed a meeting at the headquarters of Lodge 1746 in East Hartford *inter alia* as follows:

• • • • •

Your district staff met with the various business agents of the building trades and they did assure us that all outside contractors who are doing work inside of the shop would respect our picket lines in this area. This thing started at nine o'clock this morning by one department who felt we had waited long enough. They felt that we should follow this United Program right to the letter; that we should walk out with our brothers and sisters from the UAW locals at Sikorsky and North Haven. I think this department should be given a great deal of credit—Department 963 on the first shift. They started the ball rolling.

Now it becomes our job to try to keep as many of the second shift employees from going into that plant as we possibly can, and that can only be done by mass picketing. But listen, brothers and sisters, we have been waiting fifteen years for this.*

* Business Agent Sullivan admitted in his testimony that about 2 weeks before the strike he made arrangements with Attorney Zeman to represent members and supply bail bonds where necessary.

Signs carried by strikers on the picket lines and also displayed at Strike Headquarters clearly indicated that the strike was a joint enterprise of UAW and IAM in connection with current negotiations for new contracts seeking to enforce joint demands for more favorable contract provisions with respect to automatic progression, full arbitration, investigation of grievances, seniority, union shop, etc. To all intents and purposes it was from the beginning an economic strike, and so recognized by all parties, including the General Counsel of the National Labor Relations Board when the original charges and complaint were filed and issued.

B. Events during the Strike

From overwhelming undisputed evidence it appears that the strike was accompanied by extreme violence, disorderly conduct, and mass picketing to the extent that the National Labor Relations Board based upon charges filed by the Respondent in Cases Nos. 1-CB-652, 653, and 656, and pursuant to Section 10(j) of the Act, petitioned the U.S. District Court in Civil Action No. 8380 for an injunction against the Union to restrain activities alleged to be in violation of Section 8(b)(1)(A) of the Act. Thereupon, Plato E. Papps, Esq., as General Counsel for the International Association of Machinists, Washington, D.C., came to Hartford, Connecticut, to assist in the representation of Lodges 1746 and 743; whereupon, an agreed stipulation with respect to picketing was entered into before the U.S. District Court without the formality of a hearing. General Counsel Papps testified as a witness before the Trial Examiner herein, as follows:

If my memory is correct, and I told them what I had seen—the motion pictures, I said, 'I'm not going to permit any court to see those pictures. As far as I am concerned, any judge that saw them would issue an injunction immediately.' I then talked to Mr. Wells

[Attorney for United Aircraft Corporation]. I was permitted—I think I said in open court—I believe I was permitted to—I was introduced to the Court. I think we met in Chambers, Judge Klau, if my memory is correct. I explained to the judge that we didn't condone this. That as far as I was concerned it was illegal activity and that I was perfectly willing to enter into a stipulation and was quite concerned frankly with people who might be arrested and I would with consent of Mr. Wells we agreed to a stipulation.

After signing the stipulation, General Counsel Papps preempted to himself all further negotiations with Respondent and its attorney Joseph C. Wells, and thereafter on July 15, 1960, made a report, conclusions, and recommendations by MEMO TO A. J. HAYES, INTERNATIONAL PRESIDENT, as follows:

Memo to A. J. Hayes, International President

From Plato E. Papps, Chief Counsel

Subject: Report on United Aircraft Strike and Recommendation

On June 28, 1960 at the request of Vice President Coonley and the Bargaining Committees of Lodges 1746 and 743, I proceeded to Hartford, Connecticut with the object of attempting to assist these Committees in negotiating a collective agreement and strike settlement with United Aircraft Corporation. The negotiations were completely deadlocked and no meetings were taking place *at the time of my arrival*.

About June 26th Governor Ribicoff had called a meeting of the top officers of the Company, the IAM and the UAW in an attempt to have the parties get off dead center and commence negotiations. I was not present at that meeting but at that time the parties

agreed on a 3-man bargaining team, the composition of which was Vice President Coonley, Dick Thurer and John Main. These meetings never really got off the ground.

On my arrival I, together with the Bargaining Team, met with the Company for the purpose of attempting to broaden the bargaining team and after two days of negotiations we expanded the team to include me and the Local Lodge President. On June 30 our negotiations broke off on a very unsatisfactory note because of the unwillingness of the Company at that time to break off negotiations with the UAW and commence bargaining with us. However, they agreed to reconvene for a meeting on Tuesday afternoon, July 5, at which point we commenced bargaining again. (By way of explanation, it was my opinion that the easiest contract to negotiate would have been the Hamilton Standard contract because they had all but reached agreement prior to the strike but because of the unity program and other considerations broke off negotiations.)

After running through the final proposals of the Company with President Butler Seidman, and the contract that had been rejected by the membership prior to the strike, we went in and met with the Company and went down the contract clause by clause as to what was agreeable and acceptable to the Union. During the course of the bargaining, the Company withdrew a number of its prior offers on the grounds that they were made only for the purpose of persuading the Union to accept the settlement and not to strike, but that since the strike situation had changed substantially.

A. J. Hayes

It was the consensus of all members of the Committee that I would be the principal speaker for the Bargaining Committee. After a tremendous amount of general villification and extremely difficult negotiating we broke off for the afternoon by passing the difficult items in question. The items in issue then and now are as follows:

1. Full arbitration and hearing of grievances—Company won't buy!!
2. Spell out the wage increases for the reopening of the contract—Company offered 7-12¢ on January 2, 1961 but wants an extension of the contract.
3. Form of union security—Company now wants to take away the checkoff.
4. Automatic progression in lieu of merit increases or in the alternative an upgrading of one step in the merit increase—Company refuses to give in on this, and we are trying to get standards established for merit increases.
5. The return to work, reinstatement and recall of all employees—in my opinion this is the most serious aspect of the entire negotiations. Involved is the reinstatement and return of the striking employees and an attempt to minimize or save as many of the members as we possibly can who had either been discharged or replaced for violence on the picket lines and other misconduct. (Parenthetically I was shown a 12-minute excerpt of a 10,000 foot film which contained typical conduct engaged in the first week of the strike showing mass picketing, acts of violence, destruction of automobiles and property as the scabs were going through the picket lines.)

Meanwhile we had outstanding four applications for injunctions by the National Labor Relations Board to prohibit this conduct and limit the number of pickets at each gate, and one injunction on file in the State Court by the Company alleging the same acts and conduct. I was successful in stipulating as to the facts in all cases and in stipulating that we would have one picket for every 2½ feet depending on the measurement of the various gates of the plants and a minimum of at least 2 pickets at each gate.

Again, parenthetically, I was in no position to permit either the Company or the Labor Board to put in a case of testimonial evidence which could be utilized to our detriment in any subsequent civil litigation for damages under the Russel Doctrine. The object of the stipulation was to protect our membership in that, if a violation of the stipulation occurred the Board and the Company could then apply for an injunction and we would litigate the question of whether we violated the stipulation rather than litigating a contempt proceeding, thus giving our membership one more step in any proceeding before a contempt citation could issue. Ever since the stipulation, more than 200 affidavits have been filed by the Company with the Labor Board asserting violation of the stipulation and it now appears that the Labor Board will proceed this coming week for an injunction. The Company has advised me that they plan to bring an action on behalf of all affected scabs for damage to property, etc. in a sum of a million dollars or more under the *Russell* doctrine. If this suit is pressed we are in serious trouble.

All parties have been made fully aware of this situation and specific instructions have been issued to the membership to curtail this type of conduct.

Meanwhile I was called to Governor Ribicoff's office and met with the Governor for about one-half hour to

forty minutes in connection with the strike. I spent about the first 15 minutes listening to his strong objections to the picketing at the Capitol by our people while he was at the Governors' Conference in Montana, and about the last 15 minutes or so discussing the strike issues. He was pleaded that people from Headquarters were in and that we were meeting.

On Thursday of last week—July 7—because of the abuse by the Company with regard to the other members of the Bargaining Committee, Vice President Coonley set me in alone to bargain with UAC, during the course of which we negotiated and I agreed, to present to our Committee the order of reinstatement and recall of striking employees once the strike had terminated and other contract items were settled. The method would be:

1. All employees who wished to return to work must within 5 days register with the Company.
2. Recalls would commence immediately and employees would be returned to their former jobs unless their jobs were filled by scabs.
3. Where jobs were filled by scabs, all recalled employees would be offered substantial equivalent positions if such positions available on that shift, and if not, on another shift.
4. If positions not available, they would be placed on a preferential hiring list.

Parenthetically again, the number of people affected by either promotions or shift transfers are:

At Hamilton, 2 percent of the striking employees would not have their jobs available because of promotions of scabs and just under 4 percent would have an identical job but on a different shift.

At Pratt-Whitney between 1½ and 2 percent on promotions and not more than 500 or 3 percent on shift transfers.

About 8 people had been fired at Hamilton Standard and 25 people at Pratt-Whitney for misconduct and violence on the picket lines. As to these it is my belief that I can pare these down probably by another 50 percent by some difficult negotiating.

Upon getting ready to return to the Committee to report on the negotiations. I was asked by Martin Burke, Vice President of the Company, whether or not once we reached agreement the Committee would *recommend* to the membership acceptance of the contract terms. I indicated that I felt certain that once we reached agreement they would recommend the settlement to the membership but I would have to check with the Committee.

In discussion of this item with the Committee and wholly apart from contract items, it was the position of John Main and the two Presidents, Seidman and Fraser, that this was "complete surrender" and they would neither recommend nor accept such terms. After discussion I pointed out that in my opinion and according to the Company figures the strike was lost. My conclusion was based on and is based on the fact that at Hamilton, 62 percent of the employees have returned to work; at Manchester 85 percent have returned to work; and, at Pratt-Whitney 76 percent have returned to work. I pointed out to them that our position would be no stronger a week, or two or three weeks from now, and that any opportunity for settlement was at its peak at this point; that the strike was lost; and, that we had an obligation to the membership and to the organization to attempt to negotiate before we lost this aircraft plant. In reply to this, Main, Seidman, Fraser and Thurer stated that they

did not believe the "strike was lost" and both Presidents and Main stated that they "would rather build from the ashes and with dignity than recommend such a settlement to the membership." I pointed out that they could well lose this plant and even now there was one employee (Dzidziak—a leadman at Pratt-Whitney) who was talking decertification. It was their position that they would rather lose the aircraft plant, and walk with dignity than to make such a recommendation. I then told them that nowhere else in the Greater Hartford area could they hope to have a captive group of 35,000 people in which to organize and that many a smart Field General surrendered during the war before his defeat was turned into a rout. They remained adamant that all employees must return to work, including those who had been fired for misconduct or arrested for violence and/or destruction of property. Upon reporting to Burke, our position of not recommending whatever agreement was reached, but would only present to the membership the terms of agreement, and the Committees' position as to the return of all employees I was accused by Burke of "whipsawing" the Company and the negotiations again broke off.

The Company then informed me that they would commence an immediate hiring program of new hires. By this time it was 10:30 in the evening and by 11 P.M. the Company had had its press releases on TV and Radio in connection with the Union's position. I thereupon told the Committee there was nothing more I could do until they could agree among themselves that whatever agreement we reached in negotiations would be recommended to the membership.

Meanwhile the Company commenced bargaining with the UAW and they reached a settlement the day before yesterday which was accepted by their mem-

bership at North Haven. At the Sikorsky plant (UAW) a decertification petition was filed yesterday and accordingly no bargaining can occur.

As to the settlement reached by the UAW, it is identical except for one or two minor variations with the agreement that we held at Hamilton as well as with the Company's last offer to us prior to the strike at that plant. However, there is an arbitration procedure which is broader than any that we can hope to get because of the UAW Review Board at Detroit, in connection with arbitration, and which the Company will not give to us because we have not demonstrated to them any effectiveness of such review at a higher level.

Our members at Pratt-Whitney would be satisfied with the terms of the Hamilton Standard agreement with minor variations but I doubt that we can get that in all respects.

Yesterday I received a phone call from Thurer and Main in which they wanted me to get a meeting with the Company and commence bargaining again. I pointed out to them that the Company would not bargain with us in the face of our refusal to *recommend* any agreement reached and unless and until the Committee agreed to go along with that position, no useful purpose would be served either in my coming there or attempting to get a meeting. I also pointed out that every day that this strike continues and new employees are hired the settlement reached with regard to recall of employees would be exceedingly more difficult if not impossible. As of 8 P.M. last night and 10 A.M. this morning they have not changed their position. When I refused to go I did agree to call Burke to see whether or not he would meet on the basis of our Committees' terms. I called him and he refused to meet on those conditions. I reported this back to Main,

Thurer and Seidman and I told them that unless their position changed their was nothing further I could do. I also pointed out that they could call Burke if they desired and see what they could do in attempting to have him change his position.

I again talked to Burke last night about 9 P.M. in connection with West Palm Beach, which incidentally was finally settled, and as of that time no one had called him although his position remained unchanged.

In conclusion, I strongly recommend:

- (1) that the members of the Bargaining Committees be instructed that they are under an obligation to recommend to the membership whatever final agreement we reached on the basis of a settlement of a strike;
- (2) that they take a realistic appraisal of the situation and recognize that they are not in a good bargaining position and they they should try to salvage something from this strike, whatever it may be and that their failure to do so will well cost us this aircraft plant.

I am prepared to return to Hartford at any time to commence negotiations if they agree on this matter.

P. E. P.

cc: Walker
Watkins
Coonley

P.S. I have notified the Committees by telephone as to where I can be reached this weekend, which is

THE CHATEAU
STONE HARBOR
NEW JERSEY

P. E. P.

In a series of meetings with representatives of the Respondent on July 17-18-19 and 20, 1960, the negotiating parties, with Papps as chief spokesman for the Union, reached complete agreement on terms and conditions of settling the strike and entering into a new contract, subject to ratification by the respective membership of Lodges 1746 and 743, as provided in the local By-Laws—said agreements having been reduced to writing, International Vice-President Coonley called a joint special meeting of Lodge 1746 and Lodge 743 to be held at Bushnell Auditorium in Hartford, Conn., on July 23, 1960, for the purpose of presenting said agreements to the local membership for ratification. Meanwhile, discussion and debate by certain members of the local bargaining committees prior to this meeting generated such violent opposition to the proposed settlement agreements that the meeting convened in an uproar, and General Counsel Papps was shouted down and denied the privilege of reading and explaining the document to the assembled joint membership of Lodges 1746 and 743. General Counsel Papps testified that he was placed in fear of his life or serious bodily harm at the hands of the assembled mob; consequently, he hastily retreated from the Bushnell Auditorium, and returned to his Headquarters (IAM) in Washington, D.C. without obtaining the required approval of the settlement agreements by the union membership.

Shortly thereafter, Governor Ribicoff of the State of Connecticut called a summit meeting on August 5, 1960, at the Park Lane Hotel in New York City to which high ranking officials of the Union and the Company were invited. Among others this meeting was attended by International President Hayes and General Counsel Papps representing the Union, and President Gwinn and Vice President Burke, representing United Aircraft Corporation. International President A. J. Hayes, as principal spokesman for the Union, recorded the results of this meeting as follows:

MEETING WITH GOVERNOR ABE RIBICOFF, MR. GUINN,
PRESIDENT, AND MR. MARTIN BURKE, VICE PRESI-
DENT, UNITED AIRCRAFT CORPORATION- PARK LANE
HOTEL, NEW YORK, N.Y.

*Hamilton Standard Propeller, Lodge 473
Broadbrook and Windsor Locks, Conn.*

All of the terms and conditions of strike settlement set forth in the memorandum pertaining to the East Hartford Plant have also been agreed upon for the Hamilton Standard Plant.

In addition, the Company has agreed that all of the terms and conditions of the April 19, 1960 agreement will remain in effect.

A. J. M.

H/am
cc: Coonley
Main

MEETING WITH GOVERNOR ABE RIBICOFF AND MR. GUINN
PRESIDENT, AND MR. MARTIN BURKE, VICE PRESI-
DENT, UNITED AIRCRAFT CORP., PARK LANE HOTEL,
NEW YORK CITY, N. Y.

Friday, August 5, 1960

After several hours of pro and con discussion, which was in the nature of exploring all of the possible settlements of the strike now in progress, Company Officials finally agreed to the following terms of strike settlement.

East Hartford Plant

1. The Company has agreed to change its prior position with regard to registration of all employees who

desire to return to work and permit such registration to be conducted at various suitable locations inside the plant.

The Company Officials even stated that they were willing to agree to let the Union conduct the registration of its own members and submit the membership lists to the Company.

With further reference to registration, the Company agreed that those employees who were ill, out of town, or out of the country, would be afforded a greater length of time to register.

2. The Company further agreed that they would arbitrate the cases of all of the employees who were scheduled to be terminated because of illegal or improper acts during the strike. In this connection, the Company agreed that the list of 42 or 43 which had been worked out in a previous meeting with Attorney Plato E. Papps, plus some additional cases which were placed on this list by the Company since the negotiating session with Mr. Papps, will constitute the total number of cases to be arbitrated.

Further in this connection, the Company agreed that the Chief Justice of the Connecticut Supreme Court—Justice Baldwin—will select the arbitrators from Justices and Referees of the Supreme and Superior Courts. (It was further agreed that in the event the Chief Justice could not secure a sufficient number (9 or 10) due to heavy calendars or vacations, that he would select the balance from Members of the Connecticut Bar Association with 25 years' or more experience as outstanding lawyers.)

Further in connection with this, the Company agreed and the Chief Justice agreed and understands that each arbitrator will have full and complete authority

to decide (a) whether the persons in question are guilty of all or any part of the charges alleged against them; and (b) whether the extent of their guilt justifies the supreme penalty of dismissal. In other words, under the agreement it is possible for an arbitrator to decide that even though the person in question is guilty of all or in part of the charges against him, he could still be returned to work if in the judgement of the arbitrator dismissal from employment is too severe a penalty.

3. The Company further agreed that all striking employees would be return to work at the earliest possible date consistent with the needs of the Company. In this connection, the Company agreed that wherever a striker's job remains open, he or she will be returned to that position. In the event, however, that the job or position is already filled by one who returned to work or one who was hired, the returning striker will be placed on a comparable job without a reduction in his or her previous rate. If it becomes necessary later to keep such strikers on a lower paying job they will receive notification of any reduction prior to the time that such reduction is made. (The Company estimated that there were some 800 college and high school students in "summer jobs" and that all of these students would leave the employment of the Company immediately after Labor Day.)

4. Vacations. The Company agreed that accrued vacation pay will be granted to all striking employees who return to work before January 1, 1961.

A. J. H.

H/am

cc: Coonley
Main

Following this summit meeting with Governor Ribicoff, the local negotiating committees of Lodges 1746 and 743, including Grande Lodge Representative Richard L. Thurer, resumed negotiations with Representatives of the Respondent until a complete three-fold agreement for settlement of the strike was reached consisting of (1) Procedure for of recall of strikers to work, (2) Terms and conditions of a new labor contract and (3) Submissions to arbitration of the cases of 50 selected strikers previously denied recall to work by Respondent because of their alleged misconduct during the strike. Thereupon, Lodge 743 on August 8, 1960, and Lodge 1746 on August 9, 1960, notified the Respondent that their respective memberships had accepted and ratified the negotiated proposals and were ready to sign written agreements. Thereupon, the negotiated agreements as they applied to each separate plant were reduced to writing and signed by the contracting parties in the order hereinafter stated.

As part of the overall aforesaid Agreements, the duly authorized representatives of Lodge 1746 and Lodge 743, including Grand Lodge Representative Richard L. Thurer, signed and entered into similar separate written agreements with the Respondent on August 11, 1960, providing the terms, conditions, and procedure for the recall of striking employees to work. Each of these documents bears the caption "STRIK SETTLEMENT AGREEMENT," and is attached to the Consolidated Amended Complaint herein as APPENDIX B (Pratt & Whitney Division) and APPENDIX C (Hamilton Standard Division), the former being reproduced here as follows: *

* For identification and convenience these two documents will be jointly referred to as the "Striker Recall Agreements".

APPENDIX B

STRIKE SETTLEMENT AGREEMENT

This agreement made and entered into this 11th day of August 1960, by and between UNITED AIRCRAFT CORPORATION, for and on behalf of the EAST HARTFORD and MANCHESTER, CONNECTICUT, plants of its PRATT & WHITNEY AIRCRAFT DIVISION, and LODGE 1746 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, describes the terms of the settlement of the strike called by LODGE 1746 with respect to the reinstatement and recall of striking employees.

1. The union will call off the strike immediately after the acceptance and ratification by the union membership of the results of the negotiations.
2. All strikers who desire to return to work shall register in Cafeteria A of the East Hartford plant during the three-day period commencing Thursday, August 11, between the hours of 8:30 a.m. and 4:30 p.m., and such registration will be completed Saturday, August 13, at 4:30 p.m.
3. Strikers who do not register during this period will be considered as having quit and not desiring to return to work.
4. Strikers who register in accordance with the above will be returned to work in the following manner:
 - (a) If the job held prior to the strike (i.e. same job code, department and shift) is available, the registering striker will be returned to that job.
 - (b) If such job is not available, strikers will be treated as if they had been laid off, and will be recalled to other available jobs in their occupational groups and seniority areas in

accordance with their seniority, pursuant to Article VII, Section 1 and Section 2, of the contract ratified by the union on August 9, 1960.

- (c) Strikers for whom no job is available in accordance with (a) and (b) above will be placed on a Preferred Hiring List and will be recalled to job openings in their occupational groups and seniority areas which develop at any time prior to January 1, 1961 before new employees are hired. Employees on such Preferred Hiring Lists will be recalled to such job openings in the order of their seniority pursuant to Article VII, Section 1 and Section 2, of the contract referred to above.

Separate Preferred Hiring Lists shall be established for returning strikers employed at the East Hartford plant and those employed at the Manchester plant.

5. All employees who are returned to work prior to January 1, 1961 will receive their vacation or vacation pay in lieu of vacation.

Employees who are returned to work prior to October 1, 1960 and who at that date have not taken a vacation will receive their vacation pay on October 14, 1960.

Employees who are returned to work between October 1 and December 31, 1960 will receive their vacation pay not later than December 30, 1960.

Dated at Hartford, Conn. this 11 day of August, 1960.

LODGE 1746 of INTERNATIONAL
ASSOCIATION OF MACHINISTS

By /s/ DAVID FRASER
David Fraser

/s/ EUGENE L. RIPOLONE
Eugene L. Ripolone

/s/ THOMAS J. RADZEVICH
Thomas J. Radzevich

/s/ WALTER J. KELLY
Walter J. Kelly

/s/ ROLAND F. MARSHALL
Roland F. Marshall

/s/ JOHN K. MAIN, SR.
John K. Main, Sr.

/s/ RICHARD L. THURER
Richard L. Thurer
Grand Lodge Representative

UNITED AIRCRAFT CORPORATION
PRATT & WHITNEY AIRCRAFT
DIVISION

By /s/ A. S. SMITH
A. S. Smith

For comparison only, paragraph 4(b) of APPENDIX C (Hamilton Standard Division) is reproduced here, as follows:

If such job is not available, strikers will be recalled to comparable or other available jobs in accordance with their seniority and demonstrated ability pursuant to Article VII, Section 1 and Section 2, of the Windsor Locks contract ratified by the Union on August 8, 1960, or pursuant to Article VII, Section 1, of the Broad Brook contract ratified by the Union on the same date.*

Article VII, Section 1-2 of the new Pratt & Whitney labor agreement ratified by Lodge 1746 on August 9, 1960 (executed on August 16, 1960), is identical with the corresponding article and sections of the new Hamilton Standard labor agreement ratified on August 8, 1960, except that the former provides for layoff and recall of employees by occupational groups within specified seniority areas in accordance with their seniority; whereas, the latter provides for layoff from and recall to specified seniority areas (at the Windsor Locks plant) or by departments (at the Broad Brook plant), as follows:

ARTICLE VII

Seniority

Section 1.

(a) In case of an indefinite layoff for lack of work, employees shall be laid off and recalled by noninterchangeable occupational groups within specified seniority areas in accordance with their seniority (length

* It thus appears that the procedure provided for recall of strikers is a part of the layoff and recall provisions of new "labor agreements" with respect to wages and working conditions dated August 8-9, 1960.

of continuous service with the company since the most recent date of hire).

(b) Nothing herein shall preclude the company from offering a transfer to an employee scheduled to be laid off from a job in one occupational group to a job in a different occupational group, nor from recalling without loss of seniority an employee laid off from one occupational group to a job in a different occupational group in which no laid-off employee retains seniority.

(c) Due to the great amount of work involved in a layoff, it is agreed that in any layoff of three hundred (300) or more employees, the company shall have a maximum period of ten (10) days from the date of the layoff during which the union agrees that grievances arising out of the layoff will not be filed. The company, however, agrees to investigate and correct where necessary any claimed violations of this Article which are brought to its attention during this period. The company shall not be liable for back wages claimed for any part of this period and arising out of an alleged violation of this seniority article. The five-day limitation on the presentation of grievances as provided in Section 6 of Article V, Grievance Procedure, will not begin until the period mentioned above in this section has expired.

Section 2. The noninterchangeable occupational groups and the seniority areas mentioned in Section 1 above have been mutually agreed upon and are incorporated and made parts of this agreement as Appendices "B" and "C" attached hereto.

The final issue with respect to settlement of the strike pertained to the recall of 50 strikers being denied reinstatement by reason of alleged misconduct; whereas, the Union insisted that they be restored to full rights of em-

ployment without any penalty whatsoever. This matter was disposed of on August 24, 1960, by the "Arbitration Agreement" appearing in the record as R. Exhibit 125 in the form of a "Submission" to the Honorable Raymond E. Baldwin, Chief Justice of the Supreme Court of Errors for the State of Connecticut who, as stated therein, was requested and authorized to name a panel of three arbitrators (and a fourth as an alternate) from among the retired judges of the aforesaid court to hear and render final decision in the matter. The panel of Judges so designated to serve as arbitrators were given full, complete and final jurisdiction and authority to determine and decide whether any of the 50 strikers should, under all of the circumstances, be accorded all or any part or none of the rights and privileges accorded other striking employees under the Striker Recall Agreements. It was provided, however, that the panel should have no jurisdiction or authority to award backpay to any employees involved in this matter or to assess against any of the parties any monetary award or penalty. Thereafter, the Respondent strictly complied as to each of the 50 strikers with the decision and award of the Baldwin Arbitration Panel.⁷

Consequently, we find that the strikers herein have never made an unconditional offer to return to work; but on the contrary through the duly authorized representative of each bargaining unit involved, after ratification by vote of the membership, entered into negotiated agreements setting forth the terms, conditions, and procedure for the recall of strikers to work pursuant to a new labor agreement for each bargaining unit. It was recognized, estimated, and agreed by all parties that there would not be

⁷ In total disregard of the exhaustive investigation, deliberations, and awards of this distinguished panel of experienced judges, and complete acceptance and compliance by the Respondent, the complaint filed herein includes each of this group of 50 employees as alleged discriminatees.

jobs available to recall all strikers immediately and that under the Respondent's system of job classification it was not possible to identify the particular jobs formerly held by individual strikers except by means of an overall classification by job code, labor grade, occupational code, seniority area, shift, department, plant, and other descriptive methods. The job code is the basic identification of jobs throughout the Respondent's plants with respect to available work to be performed, and it has always been customary practice to hire employees to fill job codes rather than particular jobs occupied by individual workers. Consequently, each operation requires a work complement commensurate with the volume of work to be performed, and a job becomes available only as additional workers within a job code are needed to perform the work at hand. Recognizing this customary practice, the Striker Recall Agreements provided that all strikers desiring recall should register as employees on layoff to immediately fill all available jobs and thereafter be placed on a preferred hiring list from which other jobs would be filled as they become available. Each striker was to be recalled according to his seniority to the identical job held before the strike, and if not available be offered comparable jobs as they become available. The strike had disrupted operations of the Respondent to such an extent that it would be absurd to conclude that all strikers could be recalled in a body to resume operations on the same basis that existed when the strike started. Respondent had used every possible adjustment allowed by law to protect and continue its plants in operation throughout a 9 weeks strike by transfers, promotions, hiring new employees, overtime operations, subcontracting work, etc., and it was impossible to assume the *status quo* when the strike ended on August 9, 1960. We find nothing unusual about the agreed procedure to recall strikers, except possibly the limitation of recall to job openings "*which develop at any time prior to January 1, 1961.*" (Emphasis added.) This limitation on the

right to recall by economic strikers raises a legal issue whether or not the Respondent by enforcing such a limitation thereby engaged in discrimination against employees to discourage membership in a labor organization in violation of Section 8(a)(3) of the Act. Whether Respondent is liable to the Unions for any breach of contract is not within the jurisdiction of the National Labor Relations Board, but is the subject of Civil Actions Nos. 9084, 9085 now pending in the U.S. District Court of Connecticut before Judge Clarie, whose initial findings and judgment were handed down on March 19, 1969, of which this Trial Examiner takes judicial notice to the effect that the Court found that the strike settlement agreements and recall of strikers were administered in the utmost of good faith by Respondent, except as to minor infringements upon the right of certain strikers to be recalled to jobs in which they held seniority rather than be filled by transfers and promotions within certain departments, seniority areas, or occupational groups.

The Trial Examiner also takes judicial notice of the findings and decisions of Judge Leo V. Gaffney, Judge of the Superior Court of Hartford County, State of Connecticut, in the case of *United Aircraft Corporation v. IAM; District Lodge No. 91, IAM; and Lodge 1746, IAM* (Case No. 133884); and *United Aircraft Corporation v. IAM; District Lodge 91, IAM; and Lodge 743* (Case No. 133885) in MEMORANDUM OF DECISION dated May 31, 1968, and in MEMORANDUM OF DECISION ON HEARINGS IN DAMAGES dated November 26, 1968. (See R. Exh. 168), in which the Respondent recovered actual damages for its Pratt & Whitney Division in the sum of \$1,369,725.25, and for its Hamilton Standard Division in the sum of \$88,662, bearing interest from August 12, 1960, plus additional punitive damages in the sum of \$296,000.

C. Registration and Recall of Strikers

Paragraph 2 of the Striker Recall Agreements provided that all strikers desiring to return to work should appear and register such intention at the times and places designated therein. This registration was conducted on company premises under the supervision of representatives of both the Union and the Company, each retaining a complete list of those registered. Each striker prepared and signed a registration card showing his recall status according to previous employment and seniority; and the Respondent set up a file for these cards from which to make selections for recall and to establish the preferred hiring list required by the Strike Settlement Agreement. At the several plants of Respondent the number of strikers originally registered was as follows:

P & W East Hartford	—	4515
P & W Manchester	—	20
H - S Windsor Locks	—	1721
H - S Broad Brook	—	300
TOTAL NO. STRIKERS REGISTERED	—	6556

Administration of the Striker Recall Agreements consisted of Phase I-recall under paragraph 4(a) to the same job code, department, and shift; Phase II-recall under paragraph 4(b) to other available jobs in their occupational groups and seniority areas in accordance with their seniority, pursuant to Article VII, Section 1 and 2 of the Pratt & Whitney labor agreement ratified by the union membership on August 9, 1960, or in accordance with their seniority and demonstrated ability pursuant to Article VII of the Hamilton Standard labor agreements ratified by the Union on August 8, 1960, at the Windsor Locks and Broad Brook plants; and Phase III-recall from the Preferred Hiring List set up as nominal "Plant 90" at Pratt and Whitney, nominal "Plant 800" (Windsor Locks plant), and

"Plant 900" (Broad Brook plant) at the Hamilton Standard Division, all consisting of strikers, not previously recalled under Phase I and Phase II, to job openings which develop at any time prior to Jan. 1, 1961.

During the settlement period from the end of the strike through December 31, 1960 Pratt & Whitney recalled or offered to recall 3470 strikers to work, including 407 from the preferred hiring list set up pursuant to paragraph 4(c) of the Striker Recall Agreements; and during the same period 223 were removed from the preferred list by voluntary resignation (196), retirement (3), submission to arbitration agreement (24). Thirty-two (32) failed to pass the physical examination required in jobs offered to them; and 87 others refused to accept jobs offered to them under terms of the Striker Recall Agreements. Consequently, 723 strikers remaining on the preferred hiring list established at the Pratt and Whitney Division pursuant to the Strike Settlement Agreement, had not been offered recall to work prior to January 1, 1961. Thereupon, the Respondent terminated the remaining registered strikers at the Pratt and Whitney Division, but offered to consider each of them as a new applicant for employment upon the filing within 5-days of an application for any job he might be interested in and qualified for. Thereupon, 605 strikers complied with this latter offer, and the Respondent hired 277 of them as new employees during the months of January (132), February (87), and March (58) 1961; thereby reducing the number of available registered strikers at the Pratt and Whitney Division to 328. During this same period from January-April, 1961, inclusive, Pratt & Whitney hired 1593 additional new employees from a total list of 17,000 applicants.

During the settlement period from the end of the strike through December 31, 1960, Hamilton Standard recalled or offered to recall 1080 strikers to work; including 753 returned to their identical prestrike jobs in the same de-

partment, job code and shift at the Windsor Locks (689) and Broad Brook (64) plants; and also including 104 strikers at Windsor Locks (99) and Broad Brook (5) returned to same job code on a different shift; and also including 223 strikers at Windsor Locks (184) and Broad Brook (39) from the preferred hiring list established pursuant to paragraph 4(c) of the Striker Recall Agreements. During the same period 102 strikers were removed from consideration by voluntary resignations from Windsor Locks (84) and Broad Brook (8); by death from Windsor Locks (5); by dismissal under the Arbitration Agreement at Windsor Locks (1); and by refusal to accept jobs offered to them pursuant to the Striker Recall Agreements at Windsor Locks (3) and at Broad Brook (1). Consequently, 839 strikers at the Hamilton Standard Division were not offered recall to work prior to January 1, 1961, and were thereupon terminated pursuant to the Striker Recall Agreement. Respondent, however, immediately notified all strikers remaining on the preferred hiring list at the Hamilton Standard Division that it would without discrimination consider each of them as a new applicant for employment upon the filing within 5-days of an application for any job he might be interested in and qualified for. Approximately 585 of these remaining strikers filed new applications as directed; and during the four months period January-April 1961, the Respondent hired 177 of these registered strikers at Windsor Locks (142) and at Broad Brook (35),^{*} thereby reducing the number of available registered strikers at the Hamilton Standard Division to 408. All strikers hired after December 31, 1960, were hired as new employees without regard to seniority or other rights and privileges to which they were entitled by reason of prior employment with the Respondent.

^{*} After May 1, 1961, through December 31, 1964, Hamilton Standard hired 44 additional strikers at Windsor Locks (36) and at Broad Brook (8).

D. Statute of Limitations

The initial charge in these proceedings was filed on November 21, 1960, By Grand Lodge Representative Claude W. Fairfield to the effect that "On or about August 9, 1960, and at various dates thereafter, United Aircraft Corporation by its officers, agents, and employees, withheld employment from those whose names are listed and attached hereto and/or failed to reinstate those shown to their rightful job or jobs because of their membership and activities in behalf of Lodge No. 1746 [Lodge No. 743], International Association of Machinists, AFL-CIO, a labor organization, and at all times since such date it has refused to and does now refuse to employ the above-named employees.

On and since August 9, 1960, it, by its officers, agents and employees, have refused to bargain collectively with the authorized agents of the above-named Union, a labor organization chosen by a majority of its employees at its East Hartford, Connecticut [Windsor Locks and Broad Brook, Connecticut] plant to represent them for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

By the acts set forth above, and by interference such as intimidation, threats and by other acts and conduct, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of said Act."

At frequent intervals thereafter, said Grand Lodge Representative continued to file charges and amended charges to the same effect against the Pratt and Whitney Division and the Hamilton Standard Division of United Aircraft Corporation, until the Twelfth Amended Charges were filed in Case No. 1-CA-3357 (Pratt & Whitney) on April

12, 161, and in Case No. 1-CA-3358 (Hamilton Standard) on September 14, 1961.

Thereupon, the Regional Director for the First Region, National Labor Relations Board, on February 7, 1963, issued his "ORDER CONSOLIDATING CASES, COMPLAINT AND NOTICE OF HEARING" against United Aircraft Corporation, its Pratt & Whitney and Hamilton Standard Divisions, as Respondent therein, fixing a date for the hearing to be conducted at Hartford, Connecticut, on April 9, 1963. This complaint (first) issued on February 7, 1963, alleges in substance that since on or about May 21, 1960, and continuing to date, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, by

(1) Threatening its employees with economic reprisal for engaging in protected activities; interrogating them concerning their union affiliations and sympathies; making offers of benefit conditioned upon ceasing to engage in union or other protected concerted activity; requiring all strikers not reinstated to any position prior to December 31, 1960, in accordance with paragraphs 4(a) and 4(b) of the Strike Settlement Agreements, to file new employment applications as a condition of employment on and after January 1, 1961; requiring all strikers reinstated to a position in accordance with paragraph 4(b) of the Strike Settlement Agreements, to sign waivers of their rights to be reinstated to their prestrike positions; requiring all strikers returned to some position subsequent to the strike to undergo physical examinations; terminating on January 1, 1961, the seniority rights and other benefits for all strikers rehired on and after January 1, 1961; and treating in a disparate manner the female strikers at Hamilton Standard plants; and by

(2) Failing and refusing since August 11-13, 1960, to reinstate strikers to their former or substantially equivalent positions of employment pursuant to the terms of the Strike Settlement Agreements, because said employees had joined or assisted Lodge #1746 and Lodge #743 or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and/or had participated in the strike from on or about June 8, 1960, to on or about August 11, 1960; and by

(3) Since on or about August 13, 1960, refusing to bargain with the Union as exclusive representative of its employees by unilaterally changing strikers' rights to reinstatement, seniority and other terms and conditions of employment; and by refusing to furnish to the Union data relating to the rights of strikers to reinstatement and the manner in which the Strike Settlement Agreements were being implemented by Respondent, and related matters, and by refusing to submit a complete seniority list of employees in the bargaining unit.

It should be noted that neither this complaint filed on February 7, 1963, nor the multiplicity of charges upon which it is based, allege or in any manner refer to any misconduct engaged in by the Respondent prior to May 21, 1960, which date marked the end of the 6-months limitation period from the filing of the initial charge on November 21, 1960, beyond which the Board, or any agent or agency designated by the Board is specifically denied the power or authority to issue a complaint based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

The Respondent on March 8, 1963, filed an answer to the complaint of February 7, 1963, denying all allegations of

unfair labor practices, and at the same time filed a motion to make the complaint more specific. Meanwhile, the hearing originally scheduled for April 9, 1963, was postponed at the request of counsel for the General Counsel and the Charging Party. On April 11, 1963, the General Counsel filed his OPPOSITION AND ANSWER OF COUNSEL FOR GENERAL COUNSEL TO RESPONDENT'S MOTION TO MAKE COMPLAINT SPECIFIC in which he made certain assertions, which are pertinent to the statute of limitations herein, as follows:

However, in order to facilitate the joinder of issues and to advise Respondent of General Counsel's position as to various allegations, respecting which Respondent seeks specificity, and without retracting in any way the force of his objections to the propriety of such a Motion just described, regarding such Motion as falling into the approximate area comprised by a Bill of Particulars, the General Counsel answers as follows:

1. As to paragraph 1 of Respondent's motion: Strikers' right to reinstatement, etc., refer to the rights granted to economic strikers by the Act. The acts referred to are as follows:

(a) The exaction by Respondent of a waiver from all strikers on their return to work;

(b) The imposition upon all strikers not returned to work before January 1, 1961, of a requirement to apply anew, and the treatment of all such strikers as new employees.

2. As to paragraph 2 of Respondent's Motion: The General Counsel asserts that the strikers named in Appendix A of the complaint are *economic strikers*. (Emphasis added.) The failure to reinstate refers to a failure to reinstate them to their former or substantially equivalent positions of employment.

3. As to paragraph 3 of Respondent's Motion: The General Counsel asserts that Respondent failed to accord to all those named in Appendix A of the complaint their rights as *economic strikers*. (Emphasis added.) In the alternative, he asserts that between January 1, 1961, and May 1, 1961, and continuing thereafter, all those named in Appendix A attached hereto were, as applicants for employment, discriminatorily denied employment.

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4. As to paragraph 4 of Respondent's Motion: The General Counsel respectfully declines to divulge the names of witnesses who were threatened, interrogated and offered benefits, as requested by Respondent in its Motion.

In the opinion of the Trial Examiner, the foregoing assertions and statements by counsel for the General Counsel on April 11, 1963, concerning his position, confirms a finding that none of the charges previously filed herein and the original complaint based thereon do not allege any violation of the Act by Respondent prior to May 21, 1960, and that the General Counsel in issuing his original complaint was conforming to the limitation of his power and authority as defined in the proviso contained in Section 10(b) of the Act. This position and finding is also confirmed by the Charging Parties on April 15, 1963, when a Thirteenth Amended Charge to the same effect as previous charges was filed by Grand Lodge Representative Claude W. Fairfield against the Pratt & Whitney Division in Case No. 1-CA-3357 and against the Hamilton Standard Division in Case No. 1-CA-3358, attaching thereto new lists of alleged discriminatees; and thereupon, the General Counsel on April 16, 1963, issued an amendment to the complaint that did not raise any material new issues; and again on May 6, 1963, counsel for the General Counsel filed a motion to further amend the consolidated complaint

to an extent that did not materially change the issues previously raised. Thereupon, the hearing opened at Hartford, Connecticut on May 16, 1963, and the Trial Examiner at intermittent sessions heard evidence pertaining to the issues raised by the pleadings until Plato E. Papps (General Counsel for IAM) on September 30, 1963, filed a Fourteenth Amended Charge against the Respondent alleging unfair labor practices dating back to the year 1953 by deliberately concealing from the exclusive bargaining representative of the appropriate unit the fact that Respondent's payroll department procures through Respondent's data processing installation a bi-weekly seniority list showing, among other things, employee name, clock number, plant, department, shift, job code, seniority date, weeks of service, rate, position, rating groups, occupational code, section and labor grade; and by concealing and lying about the aforesaid information the Respondent denied to the Union the recognition as exclusive bargaining representative to which it was entitled; and that the strike beginning on June 8, 1960, was caused and prolonged by such unlawful representations, concealment of information, frustration of collective bargaining, and by a wide variety of other unlawful acts and conduct of the Company designed to retain for management unilateral control over wages, hours and working conditions and administration of employee relations in defiance of the employees' statutory right to joint control through collective bargaining.

Thereupon, the General Counsel revised his complaint of February 7, 1963, to conform to the aforesaid Fourteenth Amended Charges, and reissued the CONSOLIDATED AMENDED COMPLAINT INCLUDING ALL AMENDMENTS MADE AND MOTIONS GRANTED BY TRIAL EXAMINER UP TO AND INCLUDING MARCH 19, 1965, which is identified among the formal papers in these proceedings as Exhibit GC-1(uuu). Whereas, all charges, complaints, and amendments issued prior to September 30, 1963, and notwithstanding the hearing and trial of issues being conducted by the duly assigned

Trial Examiner since May 16, 1963; counsel for the General Counsel requested and obtained a recess of 30 days to investigate the new charges and to revise his complaint. The final Consolidated Complaint now alleges *inter alia* in paragraphs 29 a, (1), (a), (b), (c), (d), and (2) inclusive additional unfair practices since on or about September 11, 1953 and continuing to the inception and termination of the strike; by which it is alleged in paragraphs 38 and 41 of the complaint that the Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act; and it is alleged in paragraph 31 of the final Consolidated Complaint that the strike from on or about June 8, 1960, to on or about August 11, 1960, was caused and prolonged by the unfair labor practices of Respondent described above in Paragraph 29 a.

It is entirely clear that no charge with respect to unfair labor practices engaged in prior to the strike (1960) was filed until the Fourteenth Amended Charges were filed on September 30, 1963; and fully recognizing that fact, the General Counsel did not allege in his complaint any illegal conduct by the Respondent prior to May 21, 1960. Both the Charging Parties and counsel for the General Counsel recognized the strike (1960) as entirely economic in character; and furthermore, from the historical background of contract negotiations dating back to 1950 and the entire record in the case, I find no substantial evidence to support any finding of unfair labor practices engaged in by the Respondent prior to the beginning of the strike on June 8, 1960, and consequently could not find that it was an unfair labor practice strike. I find, therefore, that this is a case in which the limiting proviso contained in Section 10(b) of the Act should and does apply with full force and effect; and that the Board or any agent or agency by reason of the Act itself is without authority to issue the complaint herein insofar as it is based upon any unfair labor practice occurring more than 6 months prior to the filing of the

original charge, and all subsequent charges herein with the Board and the service of a copy thereof upon the person against whom such charge is made. It is, therefore, recommended that the final CONSOLIDATED AMENDED COMPLAINT (including all amendments made and motions granted by Trial Examiner up to and including March 19, 1965) introduced in evidence herein as Exhibit GC-1 (uuu), insofar as it alleges unfair labor practices occurring prior to May 21, 1960, be dismissed; except to the extent that any evidence appearing in the record will be considered as background evidence insofar as it relates to and explains any unfair labor practices found to have occurred within 6 months prior to the filing of the original charge herein filed on November 21, 1960, in Case No. 1-CA-3355(1-3). See:

AXELSON MFG CO., 88 NLRB 761
 GENERAL SHOE, 192 F. 2d 504 (C.A. 6);
 FOOD FAIR STORES, 307 F. 2d 3 (C.A. 3)
 STAFFORD TRUCKING, INC., 154 NLRB No. 99;
 NEWS PRINTING CO., 116 NLRB 210.

E. Refusal to Bargain

Without regard to the proviso in Section 10(b) of the Act to the effect that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made; the General Counsel by motion dated January 3, 1964, added paragraph 29(a) to his consolidated amended complaint for the first time alleging:

29a. Since on or about September 11, 1953, and continuing to the inception and termination of the strike, referred to in Paragraph 31 infra, Respondent did refuse and continues to refuse to bargain collectively in good faith with Lodge #1746 and Lodge #743

(hereinafter jointly called the Union) as exclusive representative of all the employees in the units described above in Paragraph 24, 24A, 25 and 26 by refusing to furnish the Union information necessary and relevant to its functions as exclusive representative in policing the contracts then and thereafter in force, in serving and representing the employees in said units, in bargaining collectively with Respondent and in other related matters, although Respondent has such information in its possession and concealed such possession and such information from the Union and although the Union had requested such information on several occasions since September 11, 1953.*

This allegation (29a) on its face is barred by Section 10(b) of the Act, but the General Counsel contends that the alleged "concealing of unidentified information" referred to therein tolls the running of the statute of limitations; because such information was needed and desired by the Union for the purposes aforesaid; and that under such circumstances it was a legal duty of Respondent to voluntarily without request furnish such information to the Union as an aid in collective bargaining. Documents alleged to have been concealed from the Union now appear in evidence as GC-Exh. 68, which is a data processing tabulation prepared semimonthly for the payroll section of the Personnel Department at the Pratt & Whitney Division listing (1) all hourly paid employees, (2) the employee's plant, (3) department within the plant, (4) job code within the department, (5) rating in the merit rating system within each job code, and (6) within the "ratings," the employees listed in order of seniority (Tr. 6405) and GC-Exh. 73, which is a similar data processing tabulation

* The Fourteenth Amended Charge upon which this allegation (29a) is based was filed with the Board on September 30, 1963, approximately 5 months after the hearing convened on May 16, 1963.

prepared monthly for the payroll section at the Hamilton Standard Division. These tabulations are not permanent records and correctness of the information therein can be relied upon for the limited time and purpose for which they are published. Each current issue is destroyed when the next semimonthly or monthly issue is run off. Over the years since about 1950, the form in which these tabulations were published has varied, but it appears from the testimony of George Cope, Business Agent Lodge 1746, that the Union was furnished copy of a similar document by the Company upon request on August 10, 1950 (R-Exh. 37), tending to show that the Union knew that Respondent produced and used temporary records of this kind. Cope admitted that he had in previous years seen "IBM run-offs" published by the Respondent Company, and had copied such lists made available to the Union (Tr. 6418-6420); and that such lists contained substantially the same information contained in GC-Exh. 68, except possibly "military service and sex" of the listed employees. Cope also admitted that since 1951 the Union kept in its office "a book five or six inches thick, containing the names, clock numbers, job codes, labor grades and rating positions of all hourly employees" represented by Lodge 1746 at the Pratt & Whitney Division (Tr. 6423); and this book was later introduced in evidence as R-Exh. 36 (Tr. 6430). A comparison of R-Exh. 36 with R-Exh. 68 and R-Exh. 73, shows that each of these three documents contained the same type of information until 1963, and thereafter the latter two were supplemented with additional information showing (1) sex, (2) shift, (3) military service, (4) occupational code and seniority (weeks of seniority and seniority date), whereas R-Exh. 36 prepared in 1951 did not contain the latter information. It thus appears that the Respondent did not and could not conceal this type of record from the Union. In short, the allegations of paragraph 29a do not allege fraud and there is no substantial evidence in the record to support a finding of fraudulent con-

cealment so vehemently argued by counsel for the General Counsel and the Charging Parties. There is an old legal maxim to the effect that he who claims fraud must clearly allege and prove all elements of it by cogent and convincing evidence. Consequently, I find the Respondent not guilty herein of either fraud or fraudulent concealment.

There is no evidence in the record to justify a finding that the Respondent has at any time made an outright refusal to furnish information requested by the Union. The primary complaint of the Union is that Respondent has declined to analyze its own records for the Union and at its own expense with its own clerical staff and office equipment prepare and deliver to the Union massive tabulations and statistics pertaining to its business and employees. For practical purposes, it appears that the Union wished to have in its own office a counterpart of all Company personnel records in its tabulated form for quick and ready reference in the promotion and handling of grievances concerning the contract or otherwise. Correspondence between the parties dating back to 1950, and renewed at intervals thereafter, including the period from 1963 to 1968 during the progress of the hearing herein, shows that the Union is seeking to obtain at Company expense a maximum of information pertaining to individual employees in the bargaining unit. Admittedly such information might be interesting and useful for the purpose of collective bargaining but not necessarily essential or required for that purpose. The Respondent has never refused to make such information available, but strenuously objects to analyzing and preparing such statistical information at its own expense for the benefit of the Unions with whom it must bargain at arm's length concerning wages, hours and working conditions.

Information to be furnished to the Union has habitually been a subject of collective bargaining, and pertinent provisions with respect thereto have been included in all labor agreements negotiated between the parties since 1950.

Pursuant to Article VI of the labor agreement dated December 4, 1950, and by letter dated February 1, 1961 (CP-Exh. 63) the Respondent furnished Lodge 1746 (a) copy of its Hourly Job Ratings Plan including, (b) detailed job description sheets covering all hourly rated jobs included in the bargaining unit, and (c) sample copies of Employee Performance Rating Sheets together with a description of the factors, the weighting of the factors, and the ranges of scoring points relating to the established rating steps. Several months thereafter by letter dated June 30, 1952, concerning the factors and point values used in its performance rating system, one of the local unions submitted to Respondent the factors and point values used by it in a hypothetical case to determine whether the Union was correctly interpreting the company performance rating system; and in reply thereto by letter dated July 2, 1952, the Respondent notified the Union that the scoring and ratings had been correctly applied in the hypothetical case submitted. Thereafter, by letter dated September 11, 1953, appearing in the record as GC-Exh. 99, *supra*, Lodge 1746 requested Respondent to furnish a tabulation for its approximately 17,000 employees at the East Hartford plant to individually show (1) the average straight-time hourly earnings of all employees in the bargaining unit represented by Lodge 1746; (2) the average hourly earnings by labor grade of the employees in the bargaining unit; (3) the number of employees in each labor grade; (4) the number of employees at each rate, that is "Starting Rate, Job Rate," etc., of each labor grade; (5) a copy of the Company's financial statement for the year 1952 and any financial statement issued by the Company for any period in 1953; and (6) a copy of all existing Pension Plans covering employees of the Corporation. Respondent promptly replied by its letter dated September 21, 1953 (GC-Exh. 100, *supra*), sending the Union its latest financial statement issued June 30, 1953, a copy of its pension plan for employees represented by Lodge 1746, and notified the

Union that the information requested in the first four items of its letter was not available in the form requested, but could be obtained by an analysis of company records that would require considerable time, effort, and expense; and invited the Union to send in its own representatives to make such analysis it desired from records that would be made available for that purpose at the plant offices; but the Union did not presently accept Respondent's invitation to examine company records. This reply of Respondent can only be construed by the biased mentality of a union representative or advocate to be a fraudulent concealment of information to which a labor organization is normally entitled; and certainly it was not unreasonable for the Respondent to balk at the expense, time, and effort necessary to analyze, compute, and publish such massive statistics on its own time and expense for the Union. The Respondent clearly agreed to furnish and make available the only records from which this tabulation could be made. There is no reason to believe or find that GC-Exh. 68 and GC-Exh. 73 later discovered in 1963 would have satisfied the Union's requests in prior years, because those documents are certainly not in the form requested; and it would be grossly unjust to find Respondent guilty of fraud for not suggesting the use of this type of temporary payroll data to meet the ever increasing demands of the Union. The capabilities of Respondent to produce such statistics was apparent, and it was recognized by all negotiating parties that the time and expense involved was the only stumbling block involved. Consequently, new labor agreements were negotiated providing again the type of information to be furnished to the Union as an aid in administration of the contract.

Respondent's labor agreements with Lodge 1746 customarily expired in the month of December, and those with Lodge 743 usually expired in the month of April thereafter. Lodge 1746 customarily negotiated new or renewal contracts in the fall, followed in the spring by negotiations

with Lodge 743. Several months prior to expiration of contracts in 1955 and 1956, the Union by letter dated May 27, 1955 (GC-Exh. 100, *supra*), requested ten (10) separate items of statistical information for each of the approximately 17,000 employees at the East Hartford plant plus (1) the number of employees in each labor grade; (2) the average hourly rate of pay of employees in the unit for which Lodge 1746 is the bargaining agent; and (3) information on costs of the medical insurance program, showing: (a) premiums paid, (b) dividends and/or rebates received by the Company.¹⁰ In reply thereto by letter shown in the record as GC-Exh. 115, *supra*, Respondent renewed its invitation to the Union to send representatives with suitable clerical assistance to offices of the Company and obtain all desired information from original records showing the type of information desired. For a second time the Respondent took the position that it would furnish the records containing requested information, but denied any obligation to analyze and prepare such massive statistical tabulations for the Union at its own expense. From all the evidence, facts and circumstances I find no desire by the Respondent to deprive the Union of needed information, and it did not refuse to furnish such information within the meaning of Section 5 of the Act and policies of the National Labor Relations Board.

The next request for information came by letter from Lodge 1746 dated September 25, 1958 (see GC-Exh. 103, *supra*), seeking an analytical tabulation of substantially the same information requested in its previous letter of May 27, 1955 (GC-Exh. 101, *supra*), but Respondent's reply thereto does not appear in the record, but can reasonably be presumed to be the same as its response to the former

¹⁰ Approximately 5 months later by letter dated November 1955, Lodge 743 requested identical information with respect to all employees in the unit represented at the Windsor Locks plant of the Hamilton Standard Division.

request for similar information. Consequently, my ruling would be the same that there was no refusal by Respondent to furnish information within the meaning of Section 8(a)(5) of the Act.

The final request by the Union for "information" was made by letter to the Respondent (GC-Exh. 104, *supra*) dated February 3, 1959, calling for "complete seniority and payroll information for each employee in the units represented by Industrial Aircraft Lodge 1746, IAM, for the period covered by the present contract as requested in items one through 10," previously set forth in its letters of May 27, 1955, November 3, 1955, and September 25, 1958. In reply thereto (see GC-Exh. 105, *supra*), the Respondent cited Article VII, Section 6 of the current labor agreement, which would expire on December 4, 1959, providing that a list would be prepared showing the seniority of the employees each 6 months and that a copy of such list would be given to the Union; and Article VI, Section 14 of the contract, obligating the Respondent Company "to make available to the Union at quarterly intervals records disclosing the names of employees in the bargaining unit who in the previous calendar quarter have received an increase in the base rate as a result of performance rating," which records would "reveal the name, department number, job code, previous base rate, new base rate and rating of such employees"; and suggested that the Union "rely upon this information which is available to you under the current contract or has been supplied to you in the past." It is not contended by the General Counsel that Respondent at any time has failed to furnish the information agreed to in successive contracts; and the seniority list referred to in Article VII, Section 6, therein has been furnished to the Union at 6-month intervals for many years, including the name, clock number, department and weeks of service for each employee in the bargaining unit. In the year 1955 the information given to the Union also included each employee's shift, occupational group,

job code, labor grade, rate per hour, merit rating classification, date of last merit increase and amount of such increase (see GC-Exh. 122 and Tr. 7194-7216). Beginning in April 1959, the Respondent again furnished to the Union the same individual data concerning each employee in the bargaining unit as that furnished in 1955 to fill in the information called for on 3x5 inch cards prepared in advance by clerical personnel of the Union. From the seniority list furnished by the Company pursuant to Section 6, Article VII of the contract, the Union had prepared such a card for each employee showing his name, clock number, department and weeks of seniority; whereupon, the remaining information was filled in by clerks of the Union to whom, by request, it was given orally from company personnel records.

The course of collective bargaining between the parties with respect to information to be furnished to the Union shows that the parties frequently discussed, reached agreement on various listings of tabulated employee data, and thereupon incorporated such agreements in the labor agreement consummated in 1950 and in succeeding contracts with Lodge 1746 and Lodge 743, including the strike settlement agreements of 1960. Provisions with respect to such data and information usually appears in Articles IV, V, VI, and VII of the Pratt & Whitney agreements, and similar provisions also appear in the Hamilton Standard agreements; all of which were introduced herein as exhibits by counsel for the Charging Parties. In my opinion, these various collective-bargaining agreements and Respondent's responses throughout the years to union demands for information, demonstrate good faith in collective bargaining rather than fraud and fraudulent concealment of company records from the Union. In any event, GC-Exh. 68 and GC-Exh. 73 are not company records in a form that would satisfy the demands of the Union for complete seniority and payroll information for each employee in the bargaining unit, including the average hourly rate of pay

for each employee in each labor grade in the bargaining unit, and including the 10 categories set forth in its letters of May 27, 1955, and February 3, 1959. It was no lie and not fraudulent concealment when the Respondent said that information was not available in the form requested, and offered to make available the necessary company records from which to tabulate and compute the desired information, much of which had been previously furnished to the Union in a variety of forms. Furthermore, the listing shown in GC-Exh. 68 and GC-73 was not limited to employees in the bargaining unit, and did not include historical information requested by the Union such as average straight-time hourly earnings, average hourly earnings by labor grade, number and rate of employees in each labor grade, date and amount of last merit raise, date of hire, seniority area, position of each employee to other employees in occupational groups in each seniority area, date each employee began working in his classification, the number of leadmen assigned to each job classification or classification group, and the average hourly rate of pay of each employee in the bargaining unit. Had such listings been suggested by either party at the time aforesaid requests were made, it is highly probable that neither of them would recognize or accept such temporary documents as a timely compliance with the union demands for complete and permanent information for use as a basis for reopening and renegotiating expiring labor agreements, as indicated by the timely request for such information. The cry of fraud and fraudulent concealment by counsel for the Charging Parties in the Fourteenth Amended Charge a decade later, thereby procuring a redrafting of the complaint by counsel for the General Counsel several months after the opening of the hearing in 1963, appears to be extremely clever strategy to suspend the statute of limitations and obtain legal sanction to change an unfavorable economic strike to an unfair labor practice strike with more favorable aspects towards the Union. Any unfair labor practices en-

gaged in after June 8, 1960, could not be the cause of the strike, but at most could only prolong it. I find, therefore, that the strike beginning June 8, 1960, was not caused by unfair labor practices of the Respondent. I also find of course that the alleged violations set forth in paragraph 29a of the complaint are barred by the limitations of Section 10(b) of the Act.

Other allegations were added to the complaint by motion of the General Counsel filed on August 18, 1964, and granted on March 19, 1965, bringing into question certain bargaining positions taken by the Respondent during contract negotiations between the parties on and prior to December 3, 1959, when the respective bargaining committees reached agreement on terms and conditions of the new labor agreement to be submitted for ratification to a vote of the membership, which was thereupon rejected. These matters were never covered by any charge filed by the Union, and their inclusion in the complaint appears to be an afterthought of counsel for the General Counsel and the Charging Parties after the hearing had been in session for more than one (1) year. In substance it is now alleged as paragraph 29a(1) that since on or about October 29, 1959, Respondent refused to bargain in good faith with Lodge 1746 by (a) on or about December 3, 1959, May 27, 1960, June 6, 1960, July 21, 1960 and August 5, 1960, conditioning all counterproposals to the Union Negotiating Committee upon submission to the Union membership with their recommendation of acceptance and ratification; (b) insisting on an agreement that the services of a steward would not be furnished to process a grievance unless management considered it subject to the grievance procedure of the contract; (c) insisting that Respondent have the unqualified right to assign work and jobs to "employees or other persons"; (d) insisting that the definition of "employee" as used in the contract not include "trainees"; and in paragraph 29a(2) it is alleged that by

insisting on such illegal conditions, Respondent failed and refused to make any valid and legal counterproposal to the union bargaining committee. On their face these allegations simply recall unpleasant features of negotiations between the parties that resulted in agreed proposals for submission to ratification by the union members, and are barred by the limitations of Section 10(b). Very little evidence on the subject was offered at the hearing, and the issues raised thereby (if any) seem too puerile and far-fetched to warrant serious consideration. The Respondent could hardly be blamed for hesitating to make a proposal binding upon itself with no assurance that the duly authorized bargaining committee for the Union would make any recommendations to its constituents. Submission to the membership in stony silence without some explanation or recommendation from the bargaining committee would make a mockery of collective bargaining. No company should be expected to make proposals to a bargaining committee without authority to either accept or recommend acceptance by the principal they are purportedly representing. I am sure that such one-sided bargaining by an employer representative has been and would now be found to be a refusal to bargain in violation of Section 8(a)(5) of the Act. The same shoe fits a labor organization in an impartial administration of the Act. Again it could hardly be an unfair labor practice to request some provision in the contract to limit the activities of union stewards in promoting the processing of grievances on company time at company expense, which in this case had become burdensome and expensive for the Respondent during working hours, and was also detrimental to the working efficiency of both employees and their stewards. With respect to assignment of work, an effort to retain and preserve what was and is usually regarded as a prerogative of management should not be considered an unfair labor practice when insistence is made to include such provisions in a labor agreement; and finally, it hardly sounds plausible

to contend that Respondent engaged in an unfair labor practice when contending and seeking a contract provision to exempt specially selected persons in training for supervisory jobs from the bargaining unit, not as a compulsion but as a matter of individual choice, because even a supervisor can become a member of any labor organization of his own choosing if otherwise eligible. I find, therefore, that Respondent did not engage in a refusal to bargain within the meaning of Section 8(a)(5) by the activities alleged in paragraphs 29a(1)(a)(b)(c)(d) of the complaint; and the same ruling follows as to the allegation of paragraph 29a(2). I also find of course that all allegations of paragraphs 29a(1) and 29a(2) are barred by the aforesaid statute of limitations; and substantive evidence sufficient to justify a finding of violations of Section 8(a)(5) by the Respondent during the 1959 negotiations cannot be found in the record.

By further amendment of his complaint on January 3, 1964, the General Counsel added paragraph 29b, alleging:

29b. Since on or about October 13, 1960, and continuing to date, Respondent did refuse and continues to refuse to bargain collectively in good faith with the Union as the exclusive representative of all the employees in the units described above in Paragraphs 24, 24A, 25, and 26 by refusing to furnish to the Union data relating to the rights of strikers to reinstatement and the manner in which the Strike Settlement Agreements, referred to in Paragraph 32, *infra*, were being implemented by Respondent, and in related matter, thereby repudiating totally its obligation to bargain collectively in good faith and by refusing since the termination of the strike referred to in Paragraph 31, *infra*, to furnish the Union complete seniority lists or complete seniority information of the employees in the units described above despite requests renewed by the Union on or about October 13, 1960, October

14, 1960, November 11, 1960, November 25, 1960, April 10, 1961 and continuing to date.

The evidence with respect to this allegation appears in lengthy correspondence initiated by the Union with the Respondent in an exchange of letters beginning on October 13, 1960 (GC-Exh. 2 and 3), and ending on June 7, 1961. The entire exchange of letters consists of GC-Exhibits 2 thru 14, inclusive.

By identical letters dated October 13 and 14, respectively, Lodges 1746 and 743 requested for its bargaining unit tabulated lists, as follows:¹¹

1. Employees whose jobs were filled by replacement during the period from June 8th to the signing of the Settlement Agreement on August 11, 1960.
2. Employees who were returned to their original jobs.
3. Employees who were recalled under paragraph 4-b of the Strike Settlement Agreement showing their seniority status.
4. Employees who are recalled under paragraph 4-c of the Strike Settlement Agreement showing the seniority status of such employees.
5. Employees awaiting recall by Preferred Hiring List under the Strike Settlement showing their seniority status in their occupational group and seniority area.

The Respondent on October 21, 1960, posted identical replies to the foregoing letters, as follows:

¹¹ Union representatives were present throughout the registration of 4,535 strikers, and had the same opportunity as the Respondent to compile lists at the conclusion of the strike; and, thereafter, upon request, Respondent furnished the registration list to Lodge 1746.

You now have in your possession the names of all striking employees who registered their desire to return to work, pursuant to the terms of this agreement—such information having been furnished to you by the Company in accordance with the request you made some time ago. No formal listings showing the information requested in your letter of October 13, are maintained by the Company. However, such data may be obtained through inspection of certain basic personnel records which are kept by the Company and the correlation of information so obtained with information already furnished by the Company. It would be necessary, therefore, for us to inspect and analyze these records to compile and list the information you seek. This, of course, would require time and effort and a considerable expense on our part.

If you believe that the information which you have requested is of sufficient value to warrant the expenditure of the time and effort involved, we shall be glad to make the appropriate records which we normally maintain available to you at our offices for your inspection so that you may compile the data which you have requested.

By reason of the extensive research and clerical personnel required to compile the aforesaid information in the form requested, I find it entirely reasonable for Respondent to make available its records from which these statistics must be obtained, without furnishing at its own expense clerical assistance to perform the job. In the position taken by the Union, I find an effort to obtain from the Respondent free clerical assistance rather than a bona fide request for essential information. No doubt, the same information was also available to the Union from records in its own office and by consultation with its own members. I find no refusal by the Respondent to furnish information within the meaning of Section 8(a)(5) of the Act.

Instead of accepting Respondent's offer to make its records available for the desired compilations, Lodge 1746 and Lodge 743, on November 11 and 25, 1960, respectively, by accusatory letters threatened to file charges for alleged violations of Section 8(a)(1), (3), and (5) of the Act; and at the same time demanded additional statistical information in different form, as follows:

(1) A list of names of all employees in the bargaining unit hired since the expiration date of the contract, together with their respective dates of hire, clock numbers, classifications, job code, wage rates, shift assignments, departmental assignments, the respective seniority, either departmental or by occupational group or by seniority areas as the case may be.

(2) A list of employees in the bargaining unit hired by the Company with the attendant information requested in paragraph (1) above since 1960.

(3) A seniority list as of November 1, 1960 of all employees in the bargaining unit together with the information requested in paragraph numbered (1) above.

(4) A list of all employees in the bargaining unit who registered in the "preferred hiring list" under the terms of the Strike Settlement Agreement of August 11, 1960, together with information as to their standing for recall purposes in classification, date of seniority, and occupational groups and seniority areas.

(5) A list of all employees in the bargaining unit hired by the Company during the strike or since the strike whose names do not appear on the "preferred hiring list" or the strike settlement agreement under date of August 11, 1960, together with the attendant information requested in paragraph numbered (1) above.

The Respondent replied to the above on November 18, 1960, denying the numerous accusations contained therein, and with respect to the additional lists of employees stated, as follows:

If you do not have sufficient information upon which to base an informal judgment as to whether the Company is complying with the terms of our labor agreements, it is only because your Union has ignored our repeated offers to make available to the union detailed information concerning all employees in the bargaining unit. We will not, as we have told you before, undertake the clerical work and analyses of records necessary to furnish you with such detailed information as you requested in your letter of November 11, 1960 and as you requested many times in the past. We believe that this union should use its own clerical personnel for this task.

Concurrently with these accusatory letters of November 11 and 25, 1960, the Union filed initial charges with the National Labor Relations Board, after having been recently notified by Respondent that it would not perform the massive clerical work required, but would make necessary records available. Consequently, the Union's request for similar and ambiguous additional informational lists appears to be an effort to create and augment self-serving evidence to support the charges being filed, rather than a bona fide request for essential information. Unhesitantly, I find, therefore, that on this occasion the Respondent did not refuse to furnish information within the meaning of Section 8(a)(5) of the Act. Once again the Union declined Respondent's offer to make the necessary records available and thereby furnish the desired information. In my opinion the Union was and is trying under duress to force Respondent to perform an expensive clerical service without regard to the value or necessity of such information

as an aid to collective bargaining. The latest contract signed on August 9, 1960, provided that a seniority list would be furnished each 6 months, and was not due until on or about February 9, 1961; and contained an additional provision, as follows:

The Company agrees to make available to the Union at quarterly intervals records disclosing the names of employees in the bargaining unit who in the previous calendar quarter have received an increase in the base rate as a result of a performance rating. Such records shall reveal the name, department number, job code, previous base rate, new base rate and rating of such employees. (CP-Exh. 222, Art. VII, Sec. 6).

In accordance with the foregoing provisions of the current contract, Respondent provided said seniority list on February 4, 1961; and thereafter on April 10, 1961, Lodge 1746 addressed another letter to Respondent, saying:

Lodge 1746 has examined the February 1, 1961 Seniority Roster which the Union received from the Pratt & Whitney Division showing the name, clock number, weeks of seniority and department of bargaining unit employees of the Division.

This Seniority Roster does not permit us to determine the seniority of employees in their occupational group in the seniority areas in which such seniority is held.

Referring you to our letter of November 11, 1960 in which this information is requested, may we again ask that we be provided with a Seniority Roster that will show the seniority in the occupational group, and seniority area of the bargaining unit employees, for without such a roster we are unable to police the current agreements.

The Company responded by noting that the February 4, 1961 seniority was similar in all respects to seniority lists furnished to the Union for more than 10 previous years, and referred to its letter of November 18, 1960, to answer the renewed requests for the Company to compile information or lists for the Union. As late as May 5, 1961, Lodge 743 requested Respondent to supply it with a copy of the Preferred Hiring List showing the order of recall of employees to their jobs in the various areas and departments of two plants in the Hamilton Standard Division; and Respondent by letter dated May 26, 1961, replied, as follows:

The Company has no 'Preferred Hiring List' such as you request. It would of course, be possible for the Company by research through a great many records to make a comprehensive report showing the manner in which it complied with its obligations under the Strike Settlement Agreement covering the plants in question. Such a report, however, would be extremely lengthy and involved, and would cover a myriad of events covering a period of nearly six months. The Company has no occasion for its own purposes to construct such a report which would, in effect, comprise an entire history of the Company's compliance with its obligations under the Strike Settlement Agreement.

The Board and the courts have consistently held that an employer is not necessarily required to furnish information in the exact form requested by a labor organization—that it is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the progress of bargaining—that a union does not have the right to arbitrarily impose its own terms and conditions upon which such information must be furnished, because that is a subject of collective bargaining; and good-faith bargaining requires only that such information be made available at a reasonable time and in a reasonable

place with an opportunity for the Union to make a copy of such information if it so desire.¹² When and if the Union should reimburse Respondent for the expense of making the desired compilations from its records, or bodily assume that clerical task, which is equally burdensome and expensive to the Respondent, it could reasonably expect the cooperation of Respondent in making the necessary records available at a suitable time and place for performance of what appears to be a massive statistical undertaking. Beyond such cooperation with respect to information to which the Board and courts have held the Union to be entitled, I cannot hold that the Respondent is required to foresee the needs of a labor organization, or to keep it informed as to what information is available, or to volunteer such information. Simple failure to keep the union informed or to volunteer information in the absence of gross fraudulent misrepresentation of facts made (1) with intent to deceive, (2) with knowledge of their falsity, (3) calculated to defraud, (4) actually does defraud, and (5) results in injury to the person deceived—does not legally constitute fraud or fraudulent concealment. Simply misleading another even to the extent of making an untrue statement, or telling a lie is not fraud in a legal sense, unless all of the above elements are present.

By motion dated June 5, 1964, when the hearing had been in session for more than a year, the General Counsel added paragraph 29c to the complaint, alleging:

29c. Since on or about February 5, 1964 and continuing to date, Respondent, Hamilton Standard Division located in Windsor Locks and Broad Brook, Connecticut, and Pratt & Whitney Division, located in East Hartford and Manchester, Connecticut, refused

¹² *Cincinnati Steel Castings Co.*, 86 NLRB 592; 24 LRRM 1657 (1949). *Lasko Metal Products, Inc.*, 148 NLRB 976; 363 F. 2d 529. *Proctor & Gamble Mfg. Co.*, 160 NLRB No. 36; 62 LRRM 1617 (1966).

and is refusing to bargain collectively in good faith with Lodge #1746 and Lodge #743 as the exclusive bargaining representatives of the employees in the units described above in Paragraphs 24, 24a, 25 and 26 in that Respondent refused and failed to furnish the Unions with the following information, documents and records necessary and relevant to their functions as exclusive collective bargaining representatives of said units:

- (1) Bi-weekly "employee service record" at Pratt & Whitney;
- (2) Monthly "personnel data listing" at Hamilton Standard;
- (3) "Put-on records";
- (4) Change of status records;
- (5) Termination slips;
- (6) Lay off lists;
- (7) "Employee classification records" (also known as wage and salary master card);
- (8) "Employee ranking list" together with a copy of the "employee performance rating" of each employee on such list;
- (9) "Physical demands record" for each job in the bargaining unit;
- (10) "Functional capacity record" of each employee in the bargaining unit.

At the hearing herein throughout presentation of the case of the General Counsel from the opening session on May 16, 1963, until he rested on March 19, 1965, the Respondent was required by *subpoenas duces tecum* to produce all personnel records pertaining to the thousands of employees constituting working complements at the East

Hartford plant of the Pratt & Whitney Division and the Windsor Locks and Broad Brook plants of the Hamilton Standard Division. For a considerable length of time, by request of counsel for the General Counsel and Charging Parties, the Trial Examiner placed these voluminous documents in charge of the Official Reporter and impounded them under lock and key in an abandoned cell block adjacent to the old U.S. District Courtroom on third floor of the U.S. Post Office Building in Hartford, Connecticut, where they were made available for examination and research by counsel for all parties. It was stated by counsel for the General Counsel that he proposed to expose from these records a pattern of discrimination against the strikers registered for recall to work pursuant to the strike Settlement Agreements for the period ending December 31, 1960, and a further statutory discrimination for the 4-months period from January 1, 1961, through April 30, 1961. All records considered pertinent to this case were introduced in evidence, reproductions of which in the form of photostatic copies are now a part of the record in this proceeding. Counsel for the Charging Parties participated in this presentation, and became familiar with documents not theretofore requested by the Union for informational purposes. At any rate, in the fall of 1963 the Union, apart from the hearing in progress, initiated self-serving correspondence with the Respondent making demands for many of the records already impounded by the Trial Examiner and later introduced as evidence in this case. Letters addressed to the Respondent on September 9 and 25, 1963, were clearly a prelude to filing shortly thereafter on September 30, 1963, the Fourteenth Amended Charge against Respondent, and persuading counsel for the General Counsel to amend his complaint to such an extent that the entire nature of the case was changed and a new theory of procedure was adopted. In its letter to Respondent dated September 9, 1963, Lodge 1746 devoted five typewritten lines to a request for an up-to-date copy of the "Super-

visors Employee Relations Manual," which had already been admitted in evidence on August 23, 1963, demanding that the Union be notified in advance of any proposed changes therein or additions thereto in the future. The remainder of five typewritten pages were replete with accusations and recriminations against the Respondent.¹³

Respondent replied to this letter and tried to explain the innocuous nature of such a document pertaining to internal management affairs; and called attention to the fact that the issues of furnishing such information to the Union was presently in litigation in this case before the National Labor Relations Board. Shortly, thereafter, Respondent received another letter on the subject dated September 25, 1963, revealing the same argumentative capabilities of a legal expert; and also accusing Respondent of carefully and deliberately concealing from the Union a seniority list of hourly employees prepared bi-weekly for its personnel department, and demanding that, contemporaneously with the preparation of such lists, the Union hereafter be furnished a copy of such seniority lists. Again the Respondent replied on October 10, 1963, calling attention to Article VII, Section 6, of the current labor agreement, and also to Article VII, Section 5, of the same agreement, defining the different types of employee lists that Respondent is required by contract to furnish to the Union. The same expert draftsman in the name of Lodge 1746 replied on October 21, 1963, with further argumentative accusations against the Respondent. Concurrently therewith, the hearing was temporarily adjourned to await an investigation of the new charges dated September 30, 1963, contained in the Fourteenth Amended Charges.

Similar letters addressed to Respondent by Lodge 1746 on February 5, 1964 (GC-Exh. 111), and by Lodge 743 on

¹³ It is obvious that this letter is the handiwork of expert counsel rather than the composition of the President of Lodge 1746 (a layman), whose signature is attached thereto.

February 11, 1964 (GC-Exh. 116), eloquently portray the unreasonable position now being taken by the Union, and confirms my earlier observation that this labor organization will be satisfied with nothing less than establishment at Respondent's expense in its own office, a counterpart of all personnel records maintained by United Aircraft Corporation and keeping them up to date with current data to furnish a complete history of every employee relationship with the Employer and its supervisors. I hesitate to reproduce here such a lengthy document, but find it necessary to explain the current feud that has continued and been extended throughout this hearing for the past 6 years. The Union's letter to Respondent on February 5, 1964, to Pratt & Whitney Division (substantially the same to Hamilton Standard on February 11, 1964) reads, as follows:

Dear Mr. Morse:

On Monday, January 20, 1964, upon demand of counsel for the General Counsel, you produced in the NLRB hearing room the ledger-type document those who prepare it in your data processing installation describe as a bi-weekly seniority list. Upon examination, it was noted that this document is entitled "Employee Service Record" and that it features both the "Seniority Factor," by means of which seniority is translated into weeks, and the date to which for the purposes of the list, seniority was computed. On the list, employees considered comparably situated, i.e., in the same plant, department, job and wage rate, are ranked, in relation to each other, in order of seniority.

Your denial that this document is a "seniority list" is applicable only as an antic with semantics, characteristic of the deception by which the Company has historically kept from the Union the informational tools indispensable to effective policing and bargain-

ing and thereby frustrated performance of the Union's statutory functions and responsibilities.

Your admission that these lists are prepared bi-weekly for use by the Wage and Salary Section of the Personnel Department, and by the Personnel Advisors, aptly characterized Company stewards, confirms what the document on its face shows, that it is not only used for the purpose of administering and reviewing administration of the Company's obligations under the collective bargaining contract but that it is the indispensable basic tool. Certainly, as you admit, the list you furnished the Union every six months "showing the seniority of the employees" could not possibly suffice, for on that list the names of all of the employees covered by the agreement appear in clock number order, and it would not only be impractical from a time and cost standpoint, but actually impossible, from that list to arrange in order of seniority in relation to each other employees who are comparably situated.

The need for such arrangement in policing administration of the contract is too plain for extensive elaboration. Seniority is controlling in layoffs and recalls, and relevant in promotions and transfers. Consequently, an accurate, up-to-date, picture of the relative seniority of employees comparably situated is the prerequisite for judging compliance with the contract in every such case. Without such a picture, the Union is as helpless as a personnel advisor would be to determine whether a promotion, transfer, layoff or recall does or does not comply with the contract.

As this ultra-sophisticated Company is, and has always been, well aware, the exclusive bargaining agent needs, and is therefore legally entitled to have, the picture of relative seniority provided by the bi-weekly lists not only in connection with grievances but

for informational purposes; to be able to advise employees who may seek a transfer, or be hopeful of promotion or fearful of possible layoff what their chances might be. If the Company's personnel advisors have this information but the Union does not, the status and function of the exclusive bargaining agent is diminished and the Union is degraded in the eyes of the employees.

Moreover, it is not enough for the Union to be provided with such information when a specific grievance arises. It is the Union's statutory function and responsibility to determine whether each and every change of status conforms with the contract and, if in its opinion it does not, to so advise the employee or employees it considers adversely affected, so that he or they may file a grievance. Without a copy of the bi-weekly seniority list the Union obviously cannot even begin to perform this task. Accordingly, withholding the list from the Union must have been intended to accomplish exactly what it did—insulate the Company's administration of the agreement from effective challenge. By thus reducing the Union to impotency, the Company robbed collective bargaining of substance and transformed it into a meaningless ritual.

We therefore request that you furnish to the Union, promptly upon receipt of each bi-weekly "Employee Service Record," a copy thereof, omitting from the Union's copy if you choose, employees outside the bargaining unit. The cost of preparing such an additional copy is obviously negligible and, in any event, in our opinion, must be part of the burden imposed upon employers by Congress since without such copy, in a unit as large as this, a bargaining agent cannot perform its bargaining and policing responsibilities to its constituents. However, lest our opinion on this point not prevail, we offer to pay the fair and reasonable cost of the extra copy, until this issue is adjudicated.

While the bi-weekly seniority list will open the door to performance of the Union's policing function, it is not, of course, of itself sufficient. Thus, to keep the list current and accurate, to determine whether the contract provisions covering such matters as promotion transfer, discrimination, loss of seniority, layoff and recall are being observed or arguably violated, the Union must be promptly furnished a copy of each put on, change of status and termination slip. We therefore request that such copy be furnished us, beginning with the date you first supply us a copy of the bi-weekly "service record." Since those are now prepared in multi-form, little, if any, additional expense is involved.

This request is not to be taken as in any way superseding or relieving the Company of its obligation to furnish us semi-annually the traditional clock number list and to make available the layoff list before layoffs. The clock number list is, of course, vital for location and identification of employees known only by clock number or by clock number and name, and is therefore essential both in processing grievances and as an index to the bi-weekly seniority list. The lay off list is essential to apprise the Union of the Company's plans. All are indispensable tools for policing the contract.

But the tools referred to above are by no means all that are required. As you know, the contract historically provides that the "basic Employee Performance Rating Plan now in effect will be continued during the life of this agreement." Improper ratings may be challenged through the grievance procedure. Performance ratings are, of course, the key to rates of pay. Possession of the bi-weekly seniority list will, for the first time, open the door to effective policing of the Company's administration of the performance rating plan by laying bare the standards foremen and their reviewers use in rating employees similarly situated,

and enabling determination whether such standards are uniformly or discriminatorily applied, and whether ratings are reasonable or arbitrary. The "service record" is the basic tool here because it groups employees in the same job and department, who are rated together by the same rater and reviewer. Thus, it allows comparison of the treatment accorded each employee in relation to the others and thereby provides material for objective analysis and judgment.

Of course, the "service record" is not the only document of value in this connection. Once the appropriate grouping of employees is ascertained through the "service record" more intensive examination and evaluation of rating standards and their application become possible. Thus, the "employee classification record" reveals the rating given on each element, not merely the over all rating, as does the "service record." And, since the "classification record" carries historical data, it permits comparative examination of the treatment the same employees received in prior rating periods. Such comparison almost certainly would cast powerful light on the reasonableness or unreasonableness of current ratings. Of course, the key to such examination is identification of the employees in the same rating group, and for that the bi-weekly "service record" is indispensable.

Self-evident as it is, the vital importance of comparison of the ratings assigned to employees similarly situated is confirmed by the Company's use of the "Employee Ranking List" in the rating process. That these lists, like the bi-weekly seniority lists, have been treated as "private" and thrown away, instead of furnished to the Union, demonstrates the Company's intention to frustrate effective Union policing of the Company's administration of the merit rating plan. Again, we repeat, the Union's function in the merit rating program does not begin with the filing of a

grievance. It has the responsibility to investigate for the purpose of unearthing violations or potential violations which may turn into grievances.

Withholding from the Union materials and information in the Company's possession essential to establish what the standards used by rating officers and reviewers are, and how those standards are applied, has had its intended and inevitable effect: merit rating grievances are few and far between. Thus, although the Company is bound by contract to rate employees fairly in accordance with the Performance Rating Plan, the Company made that obligation illusory by concealing the criteria on which performance can be judged. Redress through the grievance procedure is a promise to the ear, broken to the hope. The Company did not merely disparage the Union in the eyes of the employees; it reduced the Union to a caricature of an exclusive bargaining agent. Instead of removing the feeling on the part of the worker that he is a mere pawn subject to the arbitrary power of the employer, the Company intensified it.

The consequence of withholding the merit rating data discussed above is not limited to administration of the merit plan; it also defeats effective policing and thereby in effect, nullifies the contract provision on promotions. The contract provides that promotions to jobs within the bargaining unit "shall be made on the basis of seniority, ability, and the fitness of the employee." You testified that the Company administers this provision as if seniority is irrelevant unless ability and fitness are equal. Thus, if the Union is cut off from analysis of the Company's appraisal of relative ability, it cannot possibly police administration of this provision. Again, what is ostensibly a binding contractual obligation of the Company is, by the stratagem of withholding tools essential for policing, made illusory.

To enable the Union to perform its statutory function, we therefore request that upon furnishing us a copy of the bi-weekly employee service record, you concurrently supply us also (1) a copy of the "Employee Classification Record" (or, if you prefer your "in house" jargon, "wage and salary master card"), for every employee currently in the bargaining unit and (2) every "employee ranking list" thereafter prepared, together with a copy of the "employee performance rating" of every employee listed thereon.

Moreover, since "fitness" of the employee is a factor we request that you also furnish us a copy of the "Physical Demands Record" for every job within the bargaining unit and a copy of the "Functional Capacity Record" of every employee in the bargaining unit.

Observation of the bi-weekly seniority list confirms furthermore, that by concealing and withholding it the Company not only prevented effective policing of existing contracts but defeated the Union's right intelligently to negotiate new contracts as well. As you acknowledged in your testimony, the lists, which show the actual rate of pay of each employee, also carry totals which permit easy computation of average rates by department, by job code, and in a variety of other ways. This information is so obviously essential to intelligent negotiation and bargaining that the Union requested it repeatedly over the years. The Union considered it so vital that it finally even accepted your invitation to engage in what you knew would be, and intended should be, a futile effort to compile the information from your "basic personnel records," i.e., change of status slips and the like. Compelling the Union to resort to "basic personnel records" when the Company actually had the information in summary form not only demeaned the Union and rendered it ineffectual, it made a mockery of the process of nego-

tiation upon which Congress relied to produce understanding the meaningful agreement and to avoid provocation for resort to strikes.

When it receives the bi-weekly seniority lists the Union will be able to determine and to keep track of differences and changes in average rates of pay within and among departments; it will for the first time be in a position intelligently to formulate and support wage demands and to evaluate and debate intelligently statements made and positions taken by the Company in wage negotiations. For this reason, also, we request that you commence immediately to supply us with the bi-weekly seniority list.

Finally, I should comment on the assertion in your letter of October 10, 1963, that by requesting tools which are indispensable to effective contract policing and bargaining the Union is somehow attempting to alter or amend the contract. The fact is, of course, that it is you who are attempting to alter and amend the contract. Nowhere does the contract say that the Union shall not, during the life of the contract, demand, or waives its right to demand, a copy of the bi-weekly seniority list.

Explanation of the absence, of course, is simple: you carefully concealed from the Union the very existence of the list. If the Union had known of it, not only would the Union have demanded a copy, as it did promptly upon discovery, and as it once again does now, the Union would not, and could not, for any consideration, have waived that demand. Any waiver the Company could conceivably have exacted by coercion or by purchase would have been illegal, for without a copy of the list intelligent policing and bargaining in this mammoth unit is, as you very well know, impossible, and the Union cannot legally agree with the

Company to refrain from exercising its bargaining rights.

Consequently, you resorted to concealment for the purpose of evading your statutory duty to recognize and bargain collectively with the Union. Concealment enabled you to defeat the substance of your obligation while ostensibly complying in form. Concealment enabled you plausibly to pretend that your "basic personnel records" were the only source of the information you knew the Union was seeking.

If wholesale unilateral action on subjects where agreement is required betrays wilful contempt for the practice and procedure of collective bargaining, your conduct bespeaks such contempt much more eloquently. For you have cloaked retention of unilateral control by surreptitious concealment under the guise of submitting to negotiation and policing.

As you know, Congress passed the Act to enhance the bargaining power and the dignity of employees by reducing the area of arbitrary employer power. Effectuation of Congress' objective requires constant, searching and creative questioning by the exclusive bargaining agent of management decisions and actions which affect the terms and conditions of employment of employees. Without timely access to the data and compilations which reflect and upon which management bases such decisions and actions, the exclusive bargaining agent is incapable of providing the challenges which are the essence of the system. That is why the law requires employers to supply to the bargaining agent data and computations which are the tools of contest. Now that the barrier erected by concealment has finally been stripped away we demand that you comply with the law.

The reply letter dated February 26, 1964, from Respondent to Lodge 1746 (in substance the same to Lodge 743 on same date) reads, as follows:

Dear Mr. Muise:

Reference is made to your letter dated February 5, 1964, addressed to Mr. N. B. Morse, concerning matters related to employee data and information. Your letter closely parallels a similar letter dated February 11, 1964, to Mr. J. E. Vandervoort, Personnel Manager, Hamilton Standard Division, from the President of Lodge 743, International Association of Machinists.

Your lengthy letter appears to comprise substantially the same unfounded charges, accusations, and arguments which you have previously expressed and which, as you know, are present the subject of extensive litigation before the National Labor Relations Board on a complaint issued by the General Counsel of the Board at your instigation. Inasmuch as our differences in connection with these matters are in the process of being defined and adjudicated in that proceeding, no useful purpose will be served by our debating these matters in correspondence, and we decline to do so.

We realize, however, that, during the period while the extensive and protracted litigation on which you have instigated is being tried our employees have current problems which are affected by the labor agreements between the Company and your Union. Therefore, in the interests of these employees (and for your future guidance), we wish to make the following observations.

Article VII, Section 6, of our current contract provides that the Company will prepare and provide to your Union each six months "a list showing the seniority of the employees covered by this agreement." This

provision of the contract has been in effect for many years, and the Company has heretofore fulfilled its obligations under this provision and will continue to do so.

Your letter appears to state that the list which the Company has provided under this contract provision is inadequate—although it does, of course, show the seniority of every employee covered by the agreement—and you indicate that the bi-monthly list which the Company prepares for its own use would be more useful to you.

Our recollection is that the seniority list heretofore prepared by the Company and furnished to you pursuant to Article VII, Section 6, of the contract has been in the form which your Union has agreed upon as appropriate. However, if you wish this list to be in a different order, we will be glad to discuss with you the question of the order in which you may desire this list to be furnished you. We will *not*, however, at this time discuss amending the current agreement so as to obligate the Company to prepare and furnish the Union more than one seniority list at intervals less than six months.

Your letter demands "a copy of the 'Functional Capacity Record' of every employee in the bargaining unit." This record comprises a report by medical examiners, based on their physical examination of the individual employee, of the employee's physical capacities. Such physical examination is conducted only after the employee consents thereto under an understanding that the examination is made by the Company physicians only for the purpose of enabling the Company to determine whether the employee may safely be assigned to a particular job. The information on the "Functional Capacity Record" is therefore, the physicians' diagnostic findings and judgment, based

on the physical examination of the employee, of the employee's physical capacities. As such it is not information which the employee has authorized the Company to make public to the Union or his fellow employees. Accordingly, without and express authorization from the individual involved, the Company will not release the information contained thereon as you have requested. Where such express authorization is obtained, we will be glad to make such report available to you.

The Company, at each of its divisions, maintains a personnel department as a means of efficiently operating its business. The staff of the personnel department performs many functions—including dealing with your Union in day-to-day matters and assisting the Company to comply with its obligations under its labor agreements. In performing such functions, the Company expends considerable amounts of money for salaries, materials, etc. to maintain records; analyze and correlate data; prepare statistics, arguments, and summaries; and in general to provide itself with the facilities necessary to carry out its many functions.

The Union also has functions and duties to perform and—as you state—among these is the duty to represent employees who have designated it as their representative. To perform its functions, the Union presumptively maintains offices; holds meetings; elects and trains stewards, committeemen, and other officers; publishes newspapers, fliers, and other documents to inform its members and officials; keeps records, analyzes and correlates data; prepares statistics, arguments and summaries; and provides itself with the best available tools with which to operate. Undoubtedly, these functions of the Union—like similar ones of the Company's personnel department—are expensive. Presumably, it is expenses such as these—for salaries, ma-

terials, and other operating needs—which justify the monthly dues collected from the Union members.

The National Labor Relations Act has always prohibited an employer from contributing “financial or other support” to any labor organization. The clear import of this provision of the Act is that expenses for union functions shall be borne by the Union rather than by an employer lest the union become dependent upon such “financial or other support” and thus in no position to act as a fiduciary when employee interests run counter to the employer's.

While prohibiting an employer from contributing “financial or other support” to a union, the National Labor Relations Act, through numerous decisions of the Board and the courts, has operated to insure that unions shall have access to data concerning the wages, hours and working conditions of the employees whom the union represents. The clear and often expressed purpose of this doctrine is to insure that unions have the information necessary to bargain for the employees they represent and to administer on their behalf agreements entered into with their employers.

The problem of the Company, or of any employer, in accommodating these two basic policies of the Act is obvious. On the one hand, the employer is prohibited from extending to the union “financial or other support.” On the other hand, the employer must not withhold from the union employee data necessary for the union to represent employees. This Company has attempted through the years to solve this problem in a simple manner, i.e., “by making available” to the Union information concerning the employees' wages, hours and working conditions, while, at the same time, refusing to expend its own funds—whether it be in the form of administrative expense, clerical expense, materials expense, rent, light, heat, equipment rental,

etc.—to assist the union in gathering, analyzing, correlating, or otherwise treating such information.

It is true that the Company has agreed in some instances to perform services for the Union which are “financial assistance or support” to the Union. In the case of collecting dues from our employees for the Union through check-off arrangements, and in the case of paying wages to Union stewards and other Union officers for time spent in discussing grievances with Company representatives, the Company’s “assistance” to the Union is specifically authorized by the Act. Our cooperation with the Union, therefore, in these areas is neither required or prohibited by the Act but is a matter for negotiation and judgment.

In other instances, we have assisted the Union where—at least arguably—we should not have done so. Thus, to prepare and provide your Union with a list showing the seniority of all employees whom your Union represents, is an expenditure on the part of the Company for clerical help, equipment, and material, without recompense by the Union, which literally is forbidden by the Act because it comprises “financial assistance and support.” We have agreed to do this gratuitously, however, in a spirit of cooperation to promote good labor relations. Certainly we have not extended this assistance because we were compelled to do so or, as you suggest, because it is our obligation to do so.

Accordingly, we reject the several demands that you have made that the Company expend its funds—for materials or salaries for clerical and administrative employees—to prepare various lists or provide documents (or copies thereof) to enable the Union to perform its functions beyond the extent to which the Company has obligated itself in the current labor agreement. We will, of course, continue to make relevant em-

ployee data available to your Union which it may analyze, or treat in the manner suitable to its various needs.

It is apparent from your letter that your Union has rejected any thought that the considerable financial assistance and support which the Company has heretofore extended to you was made in a spirit of cooperation. This is regrettable. Such cooperation was extended in the best interests of the many thousands of our employees. However, in this same spirit of cooperation, the Company will be glad to discuss with you the offer contained in this letter.

In a letter to Lodge 1746 dated June 18, 1964, the Respondent further explained its position with respect to the documents described in paragraph 29a of the complaint, as follows:

Dear Mr. Muise:

In conversation on June 15, 1964, with the General Counsel of the National Labor Relations Board, our counsel learned that your Union has represented to the General Counsel (or to his office) that the Company seeks to deprive the Union of relevant factual information concerning employees it represents, and that the Company contends that it has no duty under the law to divulge employee information to the Union.

For many years, the Company’s position has been that, while the Union is entitled to information concerning the wages hours and working conditions of employees who are represented by the Union, the Company is *not* under any general legal obligation to assemble, analyze compute, list, or study such employee data upon demand by the Union so as to give the Union such employee data in the form the Union de-

sires to have it. Quite simply, the Company's position is that it will make available to the Union by reasonable methods the requested information concerning each of, part of, or all of its several thousands of employees represented by the Union, but leave it to the Union to assemble, analyze, compute list, or study such data at its own expense.

On the other hand, from voluminous correspondence with the Union, from innumerable conversations with Union representatives, and from many comments of its counsel in various legal proceedings, it is our understanding that the Union disputes this policy and contends that the Company's statutory obligation includes furnishing the Union with *copies of records or written lists of employee data in the exact form and order requested by the Union whether or not the compilation of such written material involves expenditures of time and money by the Company for which no reimbursement by the Union is offered or can be expected.*

We did not consider that your letter of February 5, 1964 represented any retreat from the above-described position which the Union has so often asserted. Indeed, the next to the last sentence of that letter reiterates your position that "the law requires employers to supply to the bargaining agent data and computations which are the tools of contest." Further, your letter, *in toto*, was interpreted by the Company to state that the law requires the Company, whenever for its own purposes it maintains records or makes any written listings, compilations, computations, or analyses of basic employee data to advise the Union that it has done so and to supply copies of such written documents to the Union upon demand.

Perhaps, however, we should more carefully have separated certain details of your letter from the lengthy arguments contained therein. In any event the

principal purpose of this letter is to remedy any possible misunderstanding which may exist, and (we hope) explore the areas in which our basic differences of opinion are of no practical importance to either party. To this end, we submit the following:

- (1) *Your request that the Company "furnish to the Union, promptly upon receipt of each bi-weekly 'Employee Service Record', a copy thereof, omitting from the Union's copy—, employees outside the bargaining unit."*

This "bi-weekly Employee Service Record" is a bi-weekly report which compiles data concerning plants, departments, and individual employees not represented by your Union. For example, it contains data concerning the Pratt & Whitney Division plant at North Haven, Connecticut and other plants where the employees are represented by other unions. Accordingly, the sections of this report relating to these plants are irrelevant to any legitimate purpose your Union has expressed.

The remainder of this bi-weekly report (which relates to the East Hartford plant of the Company) lists all employees who are hourly paid and who work at the East Hartford plant. Your Union, however, does not represent all hourly paid employees at this plant. For example, as set forth in our current labor agreement, your Union does not represent employees such as "timekeepers," "technical employees," "laboratory technicians," "foremen's clerk's," "medical department employees," "first aid employees," "plant protection employees," "group supervisors," and "watch engineers," all of whom are hourly paid and, therefore, included in the section of this bi-weekly report related to the East Hartford plant. Here again the date included in the bi-weekly report concerning

these employees are data with respect to which your Union has no legitimate concern.

You propose that the Company furnish you promptly with a copy of each such bi-weekly report but appear to concede that the Company properly may omit from the Union's copy all data related to persons other than those represented by the Union. You do not suggest the manner in which the Company should prepare a copy of the bi-weekly report which omits this irrelevant information, but merely comment that the cost of preparing such a copy is "obviously negligible" and "in any event,—must be part of the burden imposed upon employers by Congress—."

The Company does not agree that Congress has placed upon employers any such financial burden as you suggest, or that it is in this instance "negligible." However, you also state that, "lest our [the Union's] opinion on this point not prevail, we [the Union] offer to pay the fair and reasonable cost" of the bi-weekly report (modified to delete all data concerning non-bargaining unit employees) "until this issue is adjudicated."

The bi-weekly report encompasses all Connecticut plants of the Division and (for each plant, including East Hartford) all hourly paid employees and was designed to do so in order to meet the Company's particular need for such a report. The need would not be satisfied by a report covering merely bargaining unit hourly employees. The preparation of a similar bi-weekly report covering only bargaining unit employees would involve considerable cost to the Company, and, in any event, you do not appear to suggest such a procedure. Rather you appear to suggest that an extra copy of the bi-weekly report be made by the Company but that all data concerning non-bargaining unit employees be deleted from it before it is delivered to the Union.

The Company can every two weeks run off an extra copy of the bi-weekly report. Further it would be possible to assign an employee of the personnel department to the task of modifying the report by hand to block out (or cut out) all data therein concerning non-bargaining unit employees. Finally, the Company would have no objection to giving the Union such a copy of the report as so modified *provided the Union obligates itself to pay the cost of the preparation thereof*. We have never, of course, performed such an operation, and therefore, can give you no reliable estimate of the cost thereof. We would, however, expect the Union to pay actual costs, including wages of employees necessarily assigned to prepare the extra copy of the report, materials, etc.

We ignored your "offer" to pay the "obviously negligible" cost contained in your letter of February 5, 1964, because we believed that this "offer" was merely an offer to pay the "few cents" which your counsel, Mr. Ratner, had indicated would be the cost of the paper in an extra copy of the report. The General Counsel appears to have some information leading him to the conclusion that you would be willing to pay actual costs. If this is a correct assessment of your position, this matter can be resolved pending a final determination of our basic differences.

- (2) *Your request that the Company supply the Union with copies of all future put-on slips, change of status slips, and termination slips.*

On each occasion when a new employee commences work, a "put-on slip" is filled out to record that fact and other data concerning the employee and the job to which he is assigned. The put-on slip is a form which is specially printed and assembled for the Company's use and consists of several duplicate sheets pasted to-

gether for ease in handling. In a year, several thousand employees may be hired and "put-on slips" filled out for each of them.

A "change of status slip" is filled out for each employee each time his employee status is altered; for example, when his pay is increased, when he is transferred, promoted, demoted, etc. The change of status slip is also a specially printed and assembled form designed for the Company's use, and consists of several copies pasted together at the top for ease in handling. *There are approximately 16,000 employees in the bargaining unit and as many as 40 or 50 thousand changes in the status may be processed each year.*

Termination slips are similar to the slips referred to above and, of course, are used whenever employees are terminated, resign, die, are laid off, or retire. *Here again several thousand termination slips may be processed each year.*

We have no objection, as we have repeatedly stated, to furnishing the Union information concerning the hiring of new employees, their subsequent changes of status, or their termination. *The dispute between us has been related, as we understand it, solely to the manner in which such information shall be transmitted to the Union. We cannot agree that the Company is obligated to transmit such information by preparing and giving to the Union copies of its records—the method which your letter insists be followed.* However, there are several alternate methods by which the information contained on these records can be furnished to the Union. For example, *we have no objection to making these records available to the Union so that it may micro-photograph them or otherwise duplicate them at its own expense at any reasonable times at the Company's offices.*

- (3) *Your request that the Company supply the Union with a copy of the "Employee Classification Record" for every employee in the bargaining unit.*

The individual "Employee Classification Record" or "Wage and Salary Master card" is a 5" by 8" card prepared for each employee to record thereon his original employment and, from time to time, each change of status which occurs to him during his employment. These cards are prepared to show in compact form the up-to-date personnel history of each employee. Only one copy of this record is prepared and maintained. The entire file of these records for current employees consists of approximately 32,000 cards with notations on both sides of the cards. *Your Union in litigation now pending in the United States District Court has made photographic copies of these cards for about 500 employees. If you wish to make copies for each of the approximately 16,000 employees involved at your own expense, we will make them available to you.*

- (4) *Your demand for "every 'employee ranking list' " to be prepared in the future, "together with a copy of the 'employee performance rating' of every employee listed thereon."*

The Company does not retain "employee ranking lists" as a normal part of its permanent system. We do have a form which supervision uses to facilitate merit rating each employee. This form is known as the "employee ranking list." After the form has been used it does not become a part of the permanent file but is regarded as a tool which is discarded because retaining it would serve no purpose. *Your demand in this instance is not merely that we make available to you copies of our records kept in the normal course of business, but rather that we institute a new pro-*

gram requiring us to create and maintain a new record system for the sole use of your Union.

Perhaps we misinterpret your demand in this respect. If we do, will you kindly clarify your request.

- (5) *Your demand for a copy of the "Physical Demands Record" for every job within the bargaining unit and a copy of the "Functional Capacity Record" of every employee in the bargaining unit.*

Your demand in this instance is that we take from our files "Physical Demands Records" for each of many jobs in the bargaining unit and individual "Functional Capacity Records" for the approximately 16,000 employees in the bargaining unit, copy them, and transmit them to the Union. Inasmuch as physical demands for jobs frequently change, and physical capacities of individual employees also are subject to change, your asserted requirements would, in addition, require the Company in the future to supply you with copies of such changed records.

We do think that the actual physical disabilities and infirmities of employees discovered by a physician in a personal physical examination ought not to be broadcast without the employee's permission unless and until that individual's physical capacities become relevant to some particular problem. We do not, however, understand your assertion in your letter of March 10, 1964, that we have "the notion that an employer is entitled to make secrecy 'deals' with employees, by which the Union is bound." Surely you do not suggest that it is improper to assure employees who are asked to undergo a personal physical examination that the results of the examination will be used only where it is necessary to determine their physical capacity to

fill a particular job, or that such assurance is properly described as a "secrecy deal."

We do not suggest, of course, if an employee is denied a promotion or a transfer by the Company on the grounds that he lacks physical fitness, that his Functional Capacity Record will not be made available at his request. In such case, his argument (and presumably the Union's) would be that, to the contrary, he was physically capable, and he could have no valid objection to his physical records being brought into the dispute (as in fact has been done in the handling of grievances on such matters in the past).

We have no objection, of course, to the Union having information concerning the physical demands for each job in the bargaining unit. Again, our only dispute here appears to concern the manner in which the Union is to obtain the information. *We have understood that it is your position that we must prepare copies of the Physical Demands Records at our expense and transmit them to you. You do not state that you are willing to make copies yourself at your expense. If, however, you are willing to do so, the Company will make them available for copying, photographing, etc., at reasonable times at its offices.*

The request for copies of personnel records contained in your letter of February 5, 1964 is hardly a modest one. Thus, in addition to the bi-weekly "Employee service Record", you propose that we furnish copies of put-on slips (from 2,000 to 4,000 a year); copies of change of status slips (40,000 to 50,000 a year); termination slips (from 2,000 to 4,000 a year); Employee Classification Records (initially about 16,000 records consisting of about 32,000 cards, and the 2,000 to 4,000 such records created each year as new employees are hired); "employee ranking lists" (more than 32,000 per year); Physical Demands Records

(about 2,200 initially and about 1,500 each year as job changes are made); and Functional Capacity Records (initially about 16,000 and 8,000 to 10,000 each year thereafter). In total, some 169,000 to 187,000 items.

The Company could, of course, employ additional administrative and clerical personnel and, by altering present record keeping procedures and by extensive use of duplicating processes, create and maintain an extra set of these personnel records for the Union. By the same token, the Union can make copies of these same personnel records and utilize its own administrative staff to create and maintain its set of these records. The result would be identical whichever method is employed except that in the first instance the Company would bear the costs whereas in the second instance the costs would be borne by the Union.

You assert that such a burden of costs is a burden which "Congress has placed upon employers." You also state, however, that "lest our [the Unions'] opinion on this point not prevail, we [the Union] offer to pay the fair and reasonable cost" of the bi-weekly employee classification record until our dispute is adjudicated. You appear to carefully refrain from stating, however, that you would be willing to pay the actual cost of creating and maintaining the extra set of personnel records described above pending adjudication of the issue.

We have made no estimate of the actual cost which would be involved were the Company to embark on the project of creating and maintaining for the Union a duplicate set of the above-mentioned personnel records, because, in any event, you appear unwilling to pay such costs. Obviously such costs would be very substantial. However, if you, in fact, would desire to

underwrite such costs, we will be glad to discuss the matter with you.

Very truly yours,

MORGAN R. MOONEY
Personnel Director

MRM: 1a

Notwithstanding the foregoing explanations, the General Counsel at behest of the Union proceeded with Section 10(j) proceedings in the U.S. District Court, and that case was settled by an agreed stipulation, *pendente lite*, (GC-Exh. 148D) under which Respondent furnished specified documents at its own expense upon condition that the Union would obtain and maintain a surety bond to cover the costs of preparing and furnishing such material not exceeding \$17,000 for the first year and \$10,000 for the second year. Evidence shown in the record (Tr. 29,901) shows without contradiction that the actual cost of supplying this information to the Union pursuant to the District Court Stipulation from August 17, 1964, through the first quarter of 1968 was \$46,667.51 to the Pratt & Whitney Division, and to the Hamilton Standard Division was \$5,460.51. Thus it appears that surety bonds posted by the Union are grossly inadequate to reimburse Respondent for the continuing costs of meeting demands made by the Union; and the propriety of furnishing much of the demanded information is not yet resolved. Issues as to furnishing information not consented to by Respondent must be determined when such occasions arise.

The original complaint issued by the General Counsel on February 7, 1963, contained paragraph 30, which now appears to be inconsistent, vague, and incomprehensible in the light of facts alleged in original paragraph 32 and in paragraph 29b added as an amendment on January 3, 1964. Paragraph 32 alleges that the strikers made an offer to

return to work pursuant to the terms of the Strike Settlement Agreements entered into between Respondent and the Union with the ratification of its membership; and paragraph 29b alleges refusal to bargain by refusing to furnish information relating to the implementation of those agreements. The agreements were not unilateral action, and any changing of strikers' rights, seniority and other terms and conditions of employment resulting therefrom should and has already been considered herein as discrimination or breach of contract, which is not a subject for collective bargaining. It is, therefore, recommended that paragraph 30 of the complaint be consolidated with paragraph 29b or dismissed.

By motion dated January 7, 1965, counsel for the General Counsel added paragraph 30A and 37K to his complaint, as follows:

30A. Since on or about January 28, 1963 and at all times thereafter to date, Respondent refused and is refusing to bargain with Lodge #1746, 743 and 700 as the exclusive representatives of all employees in the units described above Paragraphs 24, 24A, 25, 26 and 26A by refusing certain of such employees the services of a union steward upon proper request made by those employees.

37K. On or about January 28, 1963, and continuing to date, refuse the services of a union steward to certain employees in the bargaining unit described in Paragraphs 24, 25, 26 and 26A, above, upon a proper request being made.

Based upon identical evidence, the former alleges a refusal to bargain in violation of Section 8(a)(5); and the latter alleges an independent violation of Section 8(a)(1) of the Act, thereby seeking two separate adjudications of unfair labor practices rather than a derivative violation of Sections 8(a)(1) and (5). Both of these allegations

are also closely related to bargaining negotiations between the parties from October 29, 1959, thru August 4, 1960, as alleged in paragraph 29a(1)(b) of the complaint to the effect that Respondent refused to bargain by insisting that employees not be furnished the services of a union steward on company time in processing a grievance unless management considered the subject matter thereof a grievance under the contract. Having failed to reach an agreement with the Union in that respect, it does not follow that Respondent is required to call in a steward at its own time and expense during working hours whenever a disgruntled employee wishes to contest instructions received from his foreman or other supervisor on the job. The current collective bargaining agreement does not require the employer to do that. Having found, *supra*, that there was no refusal to bargain with respect to paragraph 29a(1)(b) of the complaint; and further finding that there is not sufficient evidence in the record to justify a finding of refusal to bargain in that respect at any time since October 29, 1959, I shall recommend that paragraphs 29a(1)(b), 30A, and 37K of the complaint be dismissed.

By motion dated January 7, 1965, counsel for the General Counsel also added duplicating paragraphs 30B and 37L to the complaint, as follows:

30B. Respondent refused to bargain with Lodge #1746 as the exclusive collective bargaining representative of the employees in the unit described in Paragraph 24, above, by unilaterally and without prior consultation with Lodge #1746, removing certain work from the bargaining unit described above in Paragraph 24.

37L. In or about September 1963 unilaterally remove certain work from the bargaining unit described in Paragraph 24, above.

In view of the failure and refusal of the General Counsel to clarify the issues raised thereby or to produce sufficient

evidence to justify a finding thereon, I find both of these allegations ambiguous, vague, and too obscure to furnish information as to time, place, and substance sufficient to apprise Respondent or the Trial Examiner concerning the nature of the alleged offense or to enable the Respondent to prepare a defense with respect to any unfair labor practices alleged therein. I find in the record no substantial evidence of a refusal to bargain in violation of Section 8(a)(5) or an independent violation of Section 8(a)(1) of the Act; and, therefore recommend that paragraphs 30B and 37L of the complaint be dismissed.

By motion dated January 3, 1964, counsel for the General Counsel revised paragraph 31 of the complaint to read, as follows:

31. From on or about June 8, 1960, to on or about August 11, 1960, certain employees of Pratt & Whitney and Hamilton Standard employed at the East Hartford, Windsor Locks and Broad Brook plants ceased work concertedly and went out on strike. Said strike was caused and prolonged by the unfair labor practices of Respondent described above in Paragraph 29a.

Having carefully reviewed all of the evidence pertaining to allegations of refusal to bargain in paragraph 29a of the complaint, I find no substantial evidence to justify a finding that the strike was caused or prolonged by any unfair labor practices engaged in by the Respondent either prior to the strike beginning on June 8, 1960, or during the strike ending on or about August 11, 1960. I further find that all of the allegations of 29a of the complaint refer to activities engaged in prior to May 21, 1960, which marks the limiting date provided in Section 10(b) of the Act; that the Respondent did not engage in fraud or fraudulent concealment of information from the Unions as alleged in the complaint; and that the complaint is in that respect barred from issuance by Section 10(b) of the Act. The

Respondent contends that the strike was caused by the Unions engaging in bad faith bargaining tactics in violation of Sections 8(b)(1)(A) and 8(b)(3) of the Act, as to which it filed charges with the National Labor Relations Board, but the General Counsel refused to issue a complaint; and that the Union's planning and execution of the strike on June 8, 1960, was so marked with violence and violations of Section 8(b)(1)(A) that participation by individual strikers became an illegal and unprotected act for which they were subject to discharge as an entire group without regard to individual acts of misconduct; but the Board on appeal from rulings of the Trial Examiner limited the evidence with respect to strike related violence and as to violations by the Unions of Section 8(b)(1)(A) after the beginning of the strike to either (1) the cases of 50 strikers subject to special arbitration agreements concerning their alleged misconduct, or unless (2) Respondent could show that there was a "specific" agreement as a part of the Unity Program to use violence and mass picketing. It should be noted, however, that the Respondent in its answer to the complaint asserted such an affirmative defense only with respect to the aforesaid fifty (50) strikers whose conduct was submitted to arbitration as a part of the Strike Settlement Agreements; but had agreed to recall all other registered strikers to work pursuant to the terms of the Strike Settlement Agreements.

In the opinion of this Trial Examiner both the Respondent and the Unions are bound by the terms of the Strike Settlement Agreements except to the extent that it be found that they restrict the statutory rights of economic strikers to recall at the end of the strike or thereafter to their former positions. Having found that the strike was not caused by unfair labor practices of the Respondent, it is not necessary at this time to inquire further into the real causes thereof; and the Trial Examiner will now proceed with a determination of the issues with respect to discrimination herein against registered strikers by the

Respondent in failing to carry out the terms of the Strike Settlement Agreements and/or by infringement upon their statutory rights to reinstatement as economic strikers.

F. Discrimination

It is alleged in the final Consolidated Amended Complaint (paragraph 32) that on or about August 11-13, 1969, the strikers named therein made an *unconditional* offer to return to their former or substantially equivalent positions of employment, pursuant to the terms of the Strike Settlement Agreements; and (paragraph 33) that the Respondent discriminated by failing and refusing to reinstate said employees for the reasons (paragraph 34) that they had joined or assisted Lodge #1746 and Lodge #743 or engaged in other protected activities and had participated in the strike; and it is further alleged in paragraph 35 (subparagraphs a-b-c-d-e-f) that since on or about August 13, 1960, Respondent discriminated against said employees, as follows: (a) By requiring all strikers not reinstated prior to December 31, 1960, to file new employment applications as a condition of employment on and after January 1, 1961; (b) By requiring all strikers returned to other available jobs to file waivers of their rights to be reinstated to their prestrike positions; (c) By requiring strikers being returned to some positions to undergo physical examinations; (d) By failing to reinstate female strikers; (e) By altering the seniority and vacation rights, and other benefits and privileges previously enjoyed by all strikers rehired on and after January 1, 1961; and (f) By delaying the reinstatement of strikers until after January 1, 1961, by operating with a reduced labor force and working excessive overtime during the months of September, October, November, and December 1960.

Notwithstanding this scatter-shot fashion of the foregoing allegations of the complaint, the primary real issue

with respect to discrimination is "whether the Respondent, from the end of the strike on August 11, 1960, through April 30, 1961, engaged in unfair labor practices violative of Section 8(a)(3) of the Act by failing or refusing to recall registered strikers to jobs held by them prior to the strike. For the sake of clarity, this issue will be analyzed and discussed as it pertains (1) to the period ending December 31, 1960; and (2) as it pertains to the period January-April, 1961, inclusive.

The situation herein is entirely different from cases such as the *New Orleans Roosevelt Hotel* case, 132 NLRB 248, and I do not agree with contentions of counsel for the General Counsel and Charging Party that the burden is upon Respondent to prove as an affirmative defense that the jobs of economic strikers herein were abolished or filled by permanent replacements prior to the end of the strike. No such affirmative defense has been alleged in its answer to the complaint, nor is it contended by Respondent that such was the case in all instances as to the jobs previously held by individual strikers. We have here the administration of negotiated settlement agreements including (1) the Striker Recall Agreements, (2) new labor agreements concerning grievances, wages, rates of pay, hours of employment and conditions of work, and (3) the arbitration agreement with respect to Respondent's refusal to recall 50 strikers charged with gross misconduct during the strike. Recall of strikers pursuant to these agreements, in my opinion, cannot be found discriminatory within the meaning of Section 8(a)(3) unless the treatment accorded to strikers thereunder deprived them individually or collectively of some right guaranteed to them by law or under provisions of the National Labor Relations Act. The right of economic strikers to reinstatement upon an unconditional offer to return to work is based upon Section 13 of the Act, providing that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to

strike, or to affect the limitations or qualifications on that right"; but I find nothing in the statute to augment the constitutional right to strike or to provide a guarantee of reinstatement to a former position if work in that particular job is being performed by another on a permanent basis or is no longer economically needed or desired. The most that a striker is entitled to or can expect from the employer is to be recalled without discrimination when such work in his particular former position has not been deactivated by the employer. In that respect the Striker Recall Agreements herein guaranteed recall to the job immediately, if available, which in my opinion constituted full compliance with the Act; and the Respondent further agreed therein to recall registered strikers to other available jobs for which they might be qualified within their occupational groups and seniority areas (or departments) pursuant to Article VII of the new labor agreements being ratified and signed at that time. It is clear, therefore, that this offer of other available jobs augmented the rights guaranteed to economic strikers under the Act; but the further provisions of paragraph 4(c) limiting the recall of strikers on the preferred list to job openings which develop at any time prior to January 1, 1961, before new employees are hired, restricted the rights of the strikers by failing to provide or preserve any preferential recall to their former positions after December 31, 1960, and also failed to preserve the seniority and other rights and privileges of employment previously enjoyed by them. I am, therefore, (except as to 50 strikers submitted to arbitration) constrained to find that Respondent on and after January 1, 1961, discriminated against unidentified, registered strikers by abandoning the preferred hiring list provided by the Strike Settlement Agreements, and by hiring both strikers and other job applicants only as new employees without credit for seniority or other rights and privileges of previous employment, as alleged in para-

graphs 35a and 35e of the complaint.¹⁴ I find that all available registered strikers not recalled to work by December 31, 1960, pursuant to the Strike Settlement Agreements, and, therefore, remaining on the preferred hiring list therein provided, are now entitled to reinstatement according to seniority in positions corresponding to their respective prestrike job code, department, and shift, that developed and were activated during the period January-April 1961, including those jobs in the same category that were filled by transfers or promotions within the operating organization prior to January 1, 1961, for which registered strikers were available and eligible under the terms of the Strike Settlement Agreements. Unless the General Counsel can now identify the aforesaid discriminatees by name, clock number, job code, department, and shift, and the corresponding job openings that developed on and after January 1, 1961, it will be necessary to reopen this case to obtain the required identification. It should be noted that during the hearing at page 11,786 of the transcript, counsel for the General Counsel refused to offer evidence of discrimination against individual strikers, saying that he would rest his case entirely upon proof of a pattern of discrimination. The Trial Examiner finds, however, that the evidence offered by the General Counsel and Charging Parties is insufficient to find a pattern of discrimination against all employees named and listed in the complaint.

With respect to the contractual recall period from the end of the strike through December 31, 1960, counsel for the General Counsel and the Charging Party offered before this Trial Examiner identical evidence offered by the Union in its suit for damages under Title III, Section 301 of the National Labor Relations Act in the U. S. District Court before Judge Clarie in Civil Actions Nos. 9084 and 9085; and have requested the Trial Examiner to take judicial notice of the entire record in those civil cases. In

¹⁴ See: *The Laidlaw Corp.*, 171 NLRB No. 175; 68 LRRM 1252.

contending before the Trial Examiner that Respondent discriminated against registered strikers, counsel for the General Counsel and the Charging Party rely upon this same evidence to prove herein unfair labor practices that was presented in the U. S. District Court to show breach of contract. In an overall consideration of the contracts and a masterly analysis of all the facts and circumstances of the situation, the Court found that the Respondent carried out its obligations under the Strike Settlement Agreements in good faith except in the two categories of transfers and promotions. Whenever a registered striker from the preferred list was offered employment in a job code and labor grade less than that previously held before the strike, but within his occupational code, seniority area or department, he was permitted to sign a waiver indicating his election to wait for a vacancy that might occur in his former job code prior to January 1, 1961; and thereupon, the next less-senior striker was offered the job opportunity to become an active member of the work complement. Thereafter, when the higher job grade vacancy in his pre-strike position became available, the latter employee was promoted to his former status even though it also be the former position of the striker who signed the waiver; and this also applied to any transfer of a less senior employee into the same job code, department and shift of a striker who had signed a waiver. From uncontradicted evidence herein, the Trial Examiner concurs in this ruling of the Court, and finds that such action by the Respondent also constituted discrimination within the meaning of Section 8(a)(3) of the Act, because the individual striker signing such a waiver had not lost the statutory right of an economic striker to be recalled to his former position in the same job code, department and shift when it became available. Since such strikers cannot be individually identified from the record, and in the absence of identification by agreement between the parties, I shall alternatively recommend that the identification of those strikers by the Court

be adopted, or that such identification be established at a reopening of the hearing in the instant case.

Except as set forth above, and reserving for further findings the Arbitration Agreement with respect to 50 strikers, I find no merit in the contentions of the General Counsel and Charging Parties that Respondent otherwise discriminated against employees to discourage membership in a labor organization within the meaning of Section 8 (a)(3) of the Act.

It is difficult to comprehend the position taken by counsel for the prosecution with respect to 50 of the strikers to whom Respondent denied reinstatement because of their participation in violence and malicious damage to property during the strike. In negotiations for a settlement of the strike, the Union insisted that such strikers be accorded the same rights to recall as other economic strikers. Finally, as a part of the Settlement Agreements, General Counsel Papps for the Union and Attorney Wells for the Respondent, agreed to arbitrate the matter as follows:

SUBMISSION

Industrial Aircraft Lodge 1746, and Lodge 743, International Association of Machinists, unincorporated labor organizations hereinafter referred to as the "Unions," from on or about June 8, 1960, conducted and engaged in a strike or concerted stoppage of work among employees of United Aircraft Corporation, herein called the "Company," working at the Company's plants located at the towns of East Hartford, Manchester, Windsor Locks, and Broad Brook, Connecticut. On or about August 11, 1960, the Unions and the Company entered into agreements in settlement of the strike, copies of which agreements are attached hereto and made a part hereof as Exhibits A and B. The said strike settlement agreements finally disposed of the issues with respect to the reinstatement

and recall of striking employees except with respect to an issue concerning the reinstatement rights of 50 employees who had participated in the strike and whose names are attached hereto as Exhibit C.

With respect to the said employees whose names are listed on Exhibit C, the Company declines and refuses to accord them the rights and privileges with respect to reinstatement to the Company's active employment which are accorded to other striking employees under the strike settlement agreements because of the conduct of these employees during the strike.

The Unions allege and declare that the striking employees whose names are listed on Exhibit C hereto, have not engaged in conduct which warrants said employees being according reinstatement rights any different from, or less than, those accorded any other employees who participated in the strike until the end thereof, and contends affirmatively that the employees whose names are listed on Exhibit C attached hereto should be accorded reinstatement rights and privileges to the same extent as other striking employees whose reinstatement rights are set forth in the strike settlement agreements attached hereto as Exhibits A and B.

To resolve this issue as set forth in the two preceding paragraphs, finally and completely, and without recourse whatsoever to any appeal or review under any State or federal laws by the Unions, or by the Company, or by any individual employee whose name is listed on Exhibit C attached hereto, the Unions (acting for and on behalf of themselves and in their capacity as representatives of the said individual employees so listed) and the Company agree as follows:

1. The Honorable Raymond E. Baldwin, Chief Justice of the Supreme Court of Errors for the State of

Connecticut, may appoint, and is hereby requested to appoint, a panel of three retired judges of the said Court (including a fourth judge to act as an alternate in this matter) to sit as an impartial board of arbitration to hear and decide finally and completely the aforesaid issue concerning the reinstatement rights of each of the striking employees whose names are listed on Exhibit C.

2. This panel of judges shall decide and determine the issue with respect to each employee in accordance with recognized principles of equity and law by the decision of a majority of the three (3) judges who shall hear evidence on the facts concerning such issue. In this connection, the panel shall not be required to make specific findings of fact, and its decision on the issue with respect to each employee may be in whatever written form the panel shall deem to be appropriate.

3. The Union and the Company will present to the panel evidence concerning the facts relevant to such issue which shall be heard and considered by the panels without prohibitions or limitations arising from or out of formal rules of evidence or procedure.

4. The panel shall have no jurisdiction or authority to award backpay to any employee involved in this matter, or to assess against any of the parties any monetary award or penalty, but shall have full, complete and final jurisdiction and authority to determine and decide whether any individual whose name is listed on Exhibit C attached hereto should, under all of the circumstances, be accorded all, or any part, or none of the rights and privileges accorded other striking employees under the strike settlement agreements attached hereto as Exhibits A and B.

5. . . . (provides for compensation of the panel) . . .

(Duly signed)

The foregoing submission to arbitration included by names and clock numbers forty-four (44) strikers at the East Hartford plant of the Pratt & Whitney Division, one (1) striker at the Manchester plant; and from the Hamilton Standard Division it included two (2) strikers at the Windsor Locks plant and three (3) strikers at the Board Brook plant. The Board of Arbitration (herein called the Baldwin Panel)¹⁵ held extensive individual hearings at which all parties, including the accused individuals themselves, personally appeared and were represented by counsel; and thereupon (in October-November 1960) issued final and binding awards in 31 of the 45 Pratt and Whitney cases (tr. 22,560) and in all of the five (5) Hamilton Standard cases. As to 14 of the strikers at Pratt & Whitney, consisting of (1) Earl P. Belton, (2) Robert Black, (3) William Condel, (4) Donald L. Jakubiak, (5) Joseph W. Kaminsky, Jr., (6) Eleanor Murphy, (7) Walter Reilly, (8) Roy E. Russell, (9) Donald J. Scanlon, (10) Theodore U. Sherman, (11) Lee W. Tracy, (12) Robert J. Wagner, (13) Thomas A. White, and (14) Robert J. Zukas, the Baldwin Panel found each of them guilty as charged and not entitled to further employment by the Respondent. Thereupon, the Respondent terminated the aforesaid 14 strikers.

As to two (2) other strikers at Pratt & Whitney, the Baldwin Panel found (1) Fernando Abreu and (2) Richard R. Pinette guilty of misconduct, and decreed that they be placed at the bottom of the seniority roster within their respective seniority areas and occupational groups for re-

¹⁵ By request of all parties, Governor Ribicoff authorized Chief Justice Raymond E. Baldwin to appoint the Board of Arbitrators consisting of retired justices from the Supreme Court of Errors for the State of Connecticut.

instatement when reached in that position. With a notation to that effect, the Respondent placed them on the preferred hiring list along with the other economic strikers pursuant to the Strike Settlement Agreements (tr. 22,561; R-Exh. 72(G).) Abreu was thereafter rehired on December 5, 1960, in his former job code and labor grade, but on the second shift instead of the first shift on which he worked prior to the strike (tr. 22,561-22,562; R-Exh. 150(A), p. 2). Since that time he has been promoted, put back on the first shift, received various merit increases and in 1967, received an hourly wage rate of \$3.22, whereas his prestrike rate was \$2.36. Richard R. Pinette returned to work on December 6, 1960, at his old job code and labor grade on the second shift rather than on the first shift where he worked prior to the strike. Since that time he has been promoted two labor grades, received several merit increases in pay, and in 1967, received an hourly rate of \$3.08, whereas his prestrike rate was \$2.70 an hour (Tr. 22,565).

With respect to six other Pratt & Whitney strikers, the Baldwin Panel found (1) Joseph R. A. Blair, (2) Elmer James Hicks, Jr., (3) Lymon G. Kelly, (4) Jean B. Senechal, (5) Fred Isaac Stevens, and (6) Eugene E. Taylor guilty of misconduct and decreed that they be placed at the bottom of their respective seniority areas and occupational groups for reinstatement when reached in that position on the preferred hiring list established pursuant to the Strike Settlement Agreements. In that position they were not reached by December 31, 1960 (tr. 22,566-22,567). Consequently, I find that these six (6) employees should remain on the preferred hiring list in the position decreed by the Board of Arbitration, and recalled along with other registered strikers hereinafter found to be entitled to job openings developed during the period January-April 1961.

As to Pratt & Whitney employee, Anthony S. Rakiewicz, was found guilty as charged, and the Panel decreed that he be reduced one (1) year on the seniority roster and

reinstated from that position on the preferred hiring list, but he was not put back to work prior to expiration of the Strike Settlement Agreements on December 31, 1960. Consequently, I find that he remains on the preferred hiring list for recall according to his seniority along with other registered strikers herein found to be entitled to job openings developed and activated during the period January-April 1961.

Pratt & Whitney strikers, Frederick R. Moody and George Roman, were found guilty as charged, and the Panel decreed that they be reduced two (2) years in seniority and placed on the preferred hiring list. Thereafter, George Roman returned to work on December 5, 1960, pursuant to the Strike Settlement Agreements; and in 1967 was receiving an hourly wage rate of \$3.40, whereas his rate prior to the strike was \$2.75. Frederick R. Moody was not recalled prior to expiration of the strike settlement period; and I find that he remains on the preferred hiring list for recall according to his decreed seniority status along with other registered strikers herein found entitled to job openings developed and activated during the period January-April 1961, inclusive.

Two other Pratt & Whitney strikers, George J. Gudauskas and Frederick W. Pettingill, were found guilty as charged, and the Panel decreed that they be reduced three (3) years on the seniority roster, and placed on the preferred hiring list (tr. 22,572, R.-Exh. 72). Neither of them were recalled prior to expiration of the strike settlement period on December 31, 1960. Consequently, I find that they remain on the preferred hiring list for recall according to their decreed seniority status along with other registered strikers herein found entitled to job openings developed and activated during the period January-April 1961.

With respect to the remaining four (4) of the 31 decisions rendered by the Baldwin Panel between October 19, 1960, and November 23, 1960 (R.-Exh. 72), Pratt & Whitney

strikers (1) Richard E. Fairbanks, (2) Edward J. Fitzsimmons, (3) Vinal E. Moore, and (4) Lawrence A. Powell were found not guilty of misconduct during the strike, and placed immediately on the preferred hiring list. All were reinstated in their prestrike positions prior to December 31, 1960; Fairbanks, Fitzsimmons, and Moore returned to work on December 5, 1960, and Powell returned on December 8, 1960.

In addition to the 31 cases adjudicated at Pratt & Whitney by the Baldwin Panel, the Respondent withdrew all charges against four (4) of the strikers (Josiah N. Collins, Joseph O. W. Chapman, Arthur L. Fournier and Francis P. Molloy), and placed them on the preferred hiring list (tr. 22,576-22,582). Chapman returned to his prestrike position on October 19, 1960; and since that time has received several merit increases and promotions to the effect that in 1967, his hourly wage rate was \$3.87, whereas his prestrike rate was approximately \$2.80. Fournier returned to his prestrike position on December 12, 1960; and thereafter received merit increases and promotions to the effect that in 1967, he was holding a salary exempt job at \$668.00 per month (tr. 22,584). Molloy returned to his prestrike position on December 5, 1960; and since that time has received at least one merit increase and promotion (tr. 22,584). Josiah N. Collins was not recalled prior to expiration of the strike settlement period on December 31, 1960, because his seniority bracket was not reached. Consequently, I find that he remains on the preferred hiring list of registered strikers hereinafter found entitled to job openings developed and activated during the period January-April 1961, inclusive.

The Union withdrew from the Arbitration submission the cases of six strikers at Pratt & Whitney (1) Charles E. Beam, (2) Francis Borkowski, (3) Richard U. Dubuc, (4) Zora M. Fraser, (5) Bernard M. McGuinness, and (6) William Washington (tr. 22,576); and four (4) other strikers

(1) Raymond N. Cason, (2) Thomas Finnie, (3) Malcolm J. Mattison, and (4) Arthur M. Moyon (tr. 22,577), voluntarily resigned from employment with the Respondent; and thereby withdrew their own names from the Arbitration submission.

Having shown disposition of 45 cases at the Pratt & Whitney Division from the original list of 50 strikers submitted to arbitration, the record still shows that the Baldwin Panel found two (2) strikers at the Hamilton Standard Division (Joseph Janiak, Jr. and J. F. Siana) not guilty of strike misconduct (R.-Exh. 69 and 74); two (2) others (Guarino Traghese and Jerome J. Morin) were found guilty as charged and reduced to the bottom of their respective seniority groups (R.-Exh. 68 and 73); and one (1) other (Warren Currie) was found guilty as charged and not entitled to further employment (R.-Exh. 72). Janiak, Siana, Traghese and Morin were not recalled prior to expiration of the strike settlement period on December 31, 1960. Consequently, I find that they remain on the preferred hiring list for recall along with registered strikers herein found entitled to job openings developed and activated during the period January-April 1961, inclusive. It should also be taken into consideration that Janiak was hired by the Respondent as a new employee at some time after January 1, 1961, and must be restored to his prestrike seniority and other rights and privileges previously enjoyed by him.

No complaint or exception has ever been raised by the Union or by any of the 50 strikers whose cases were submitted to the Board of Arbitration. From all of the evidence herein, the Trial Examiner finds that the entire arbitration proceeding was conducted by learned eminent jurists of the State of Connecticut with the utmost patience, thoroughness, and fairness usually accorded an accused on trial before State and Federal Courts. Eminent union attorneys were present and representing each of the strikers

throughout the hearing of this case. Records of the proceeding and the decrees rendered by the Baldwin Panel reveal that great leniency was accorded these strikers, especially in the cases of those to whom a reduction in seniority was awarded instead of dismissal. Only 14 of the 50 were denied reinstatement by reason of the gravity of their misconduct during the strike.

The National Labor Relations Board is not bound "as a matter of law" by voluntary arbitration of issues between the parties; nor by solemn binding agreement or contract between the parties in collective bargaining; but in *Speilberg Mfg. Co.*, 112 NLRB 1080; *International Harvester Co.*, 138 NLRB 51, LRRM 1155 (1962) and other decisions, the Board established a policy of encouraging the voluntary settlement of labor disputes by the recognition of arbitration awards not clearly repugnant to the purposes and policies of the Act. Consequently, I recommend that the awards and decrees of the Baldwin Panel be recognized and accepted by the Board in this case.

Notwithstanding, acceptance and compliance with such decrees in 1960, counsel for the General Counsel included these 50 strikers as alleged discriminatees in the complaint herein on the theory that notwithstanding the misconduct found by the Baldwin Panel, which was not denied, the real reason for refusal by the Respondent to recall was part of a pattern of discrimination practiced against all of its employees. Consequently, counsel for the General Counsel and Charging Parties failed and refused to call any one of these 50 strikers to deny, explain, or defend himself against charges of misconduct alleged by the Respondent in its answer to the complaint. Thereby, the Respondent at great expense to itself and by greatly prolonging this hearing, was required to again produce the motion pictures and witnesses previously introduced during the extended hearings before the Baldwin Panel in the fall of 1960; while attorneys for both General Counsel and the Charging Par-

ties continually tried by captious objections on the ground of relevancy to rulings of the Trial Examiner, after they were recorded on the record, to prevent introduction of this same evidence for consideration of the Board.

While showing the motion pictures on the screen and also individual photographs of the individual strikers concerned, witnesses identified on the record before the Trial Examiner each of the strikers found guilty by the Baldwin Panel actually engaging in violent conduct towards persons entering and leaving the premises of Respondent Company, including in many instances damage to automobiles in which they were riding. Without rehearsing all of the evidence shown by the motion pictures and by the testimony of numerous witnesses on the record, I find that the findings and decrees of the Baldwin Panel are amply justified by overwhelming evidence now appearing in the record herein. Based thereon, I further find that each of those strikers found guilty by the Baldwin Panel from every standpoint of fairness and justice is not entitled to further employment for reinstatement by the Respondent except to the extent hereinafter provided for those remaining on the preferred hiring list and herein found entitled to job openings developed and activated during the period January-April 1961, inclusive.

G. Independent Violations of 8(a)(1)

Paragraph 37 of the last amended complaint consists of 12 subparagraphs concerning isolated incidents alleging that Respondent by and through its agents, representatives and supervisors interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act. By reason of the multiplicity of persons and the variety of conduct involved, each subparagraph will be separately analyzed and discussed.

Subparagraph 37a alleges that Respondent threatened its employees with economic reprisal for engaging in union or

other protected activities. With respect to 22 supervisors alleged in this subparagraph to have threatened employees with economic reprisals, I can find no evidence whatsoever; and for that reason I shall dismiss this allegation as to (1) Robert Sweeney, (2) George Lawrence, (3) Frank Slusarz, (4) Leonard Welles, (5) Frank Desjardins, (6) John Carpenter, (7) George McCready, (8) Jack Baker, (9) John Ruff, (10) L. Davis, (11) Harold Walsh, (12) O. Hervey, (13) S. Matova, (14) Henry Ritter, (15) Edward Erbow, (16) N. B. Morse, (17) Foreman Postum, (18) Foreman Tutt, (19) Foreman Radovick, (20) Charles Hurd, (21) Foreman Andrew Birch, and (22) Foreman Joseph Slaffenhoffer. In some cases the individual named could not even be identified as a representative or supervisor of the Respondent. It was apparent from the outset that such allegations were wantonly made without description or proof, by reason of which the Respondent justly complained and moved to dismiss Paragraph 37 of the complaint in its entirety for vagueness and failure to make allegations clear enough for Respondent to prepare a defense. Ruling on that motion was deferred, but the Trial Examiner requested counsel for the General Counsel to stop long enough to inquire into the validity of remaining allegations and to clarify his 8(a)(1) allegations for the benefit of Respondent and the Trial Examiner, and to comply with the requirements of the Board's Rules and Regulations, Section 102.15(2). This he autocratically refused to do, and the Trial Examiner permitted him to proceed rather than create further dissension in the already overheated atmosphere.

(a) Foreman Cubbs (Cribbs)

Adolph Konis testified that he had been a union steward for a period of 6 months, while employed at Hamilton Standard for a period of 6 years; and went out on strike in June 1960—that approximately 2 weeks before the strike, Foreman Bill Cribbs (William F. Cribbs) said: "What are

you going to do during the strike? Yes, there is going to be a strike, and if you guys go out, you are going to be sorry, because the Company is out to break the Union";—that approximately 2 weeks before the end of the strike, Foreman Cribbs called him by telephone, and said: "Al, when are you coming back to work";—that he told the Foreman that he would be back when the strike was over; and Cribbs said: "You don't want to wait until then. You might get hurt. After all it is dog eat dog."

Foreman William F. Cribbs credibly testified that there was a lot of talk and rumors in the plant about the coming strike; but he had no discussion with individual employees, and made no speeches to groups about these rumors—that he does not recall any conversation with Konis prior to the strike, and certainly did not say: "If you guys go out, you're going to be sorry, because the Company is out to break the Union." Cribbs credibly testified further that, pursuant to instructions from his General Foreman, he called employees during the strike requesting that they return to work, but never at any time promised any reward nor threatened them in any way—that he called Konis from his office in the plant and asked him to come in to work—that Konis said that he would not cross the picket line—that he did not say to Konis: "You don't have to wait until then. You might be hurt. After all, it is dog eat dog."

Having carefully observed the demeanor on the witness stand of Adolph Konis and William F. Cribbs, without hesitation I discredit the testimony of Konis as to any alleged threats made to him by his Foreman William F. Cribbs; and to the contrary give full faith and credit to the denial of William F. Cribbs that he made any of the aforesaid threatening statements attributed to him by Adolph Konis. Consequently, I find that Respondent did not violate Section 8(a)(1) of the Act by reason of any statements made to Adolph Konis either before or during the strike.

(b) *Foreman William Robinson*

Edna Thomen testified that approximately two days before the strike Foreman William Robinson said to her: "You don't want to go out. You want to stay here and work with us,"—that I couldn't afford not to work because I had to support my family.

Finding no semblance of a threat in the foregoing statements alleged to have been made to Edna Thomen, I find no violation of Section 8(a)(1) in that respect by the Respondent.

(c) *Leonard Willis (Welles)*

Joseph O. Fournier testified that he was a leadman on first shift in Department 817 at Pratt & Whitney—that he has been a member of Lodge 1746 since 1945; served as Treasurer from 1946 to 1956; frequently acted as Shop Committeeman, and was a member of the Negotiating Committee—that shortly before the strike in June 1960, Foreman Leonard Welles from Department 816 inquired of him whether he had heard anything about the contract negotiations or thought there would be any change in the insurance; and thereupon said: "Confidentially I'll tell you this, but I won't ever repeat this anywheres, but watch yourself. You're being watched—we have meetings upstairs, and your foreman Ted was keeping an eye on you, and if anybody goes out on strike keep your nose clean because who knows what may happen, whether it be a job, I don't know."

The foregoing testimony of Fournier was not contradicted, and the approach of Respondent's foreman to him as a representative of the Union indicated that his union activities were being kept under surveillance, and that he would lose his job if the employees went out on strike. Under all the circumstances, I am constrained to find that the statements of Foreman Leonard Welles were a threat or warning of economic reprisal, and that the Respondent thereby engaged in interference, restraint and coercion of

employees in the exercise of the rights guaranteed in Section 7 of the Act.

Mrs. Grace Shea testified that at the appointed time employees were walking out on strike, when her Foreman Leonard Welles came into his department 816 and inquired: "Where is Helen Zavisky." Thereupon someone in the group replied: "Well, she has gone—she has left the plant," and Foreman Welles said: "Gee, that's too bad—she was my best worker—I hate to lose her but she is fired." Mrs. Shea testified further that she was not a member of the Union, but after the walkout started, she went on strike for the duration, joined the Union, and worked at the Union Hall doing paper work—and later in the summer 1963 volunteered to be a witness for the Union in response to a newspaper advertisement soliciting witnesses concerning the strike. Mrs. Shea also testified that Helen Zavisky went back to work in her former position.

Mrs. Shea further testified that they were getting ready to walk out when Foreman Welles announced that Helen Zavisky was fired—that one girl next to her (named Waslaski) became hysterical and cried out that she did not want to lose her job—that she couldn't go out because her daughter was sick, and that she herself was a divorcee without anyone to work for her and could not afford to lose her job.

The foregoing testimony of Mrs. Shea was not contradicted, and shows that the statement of Foreman Welles was interpreted by employees to whom it was made to be a threat that they too would be fired if they went out on strike. I find, therefore, that Respondent by and through Foreman Leonard Welles threatened, in violation of Section 8(a)(1) of the Act; to fire its employees in Department 816 if they walked out on strike, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

(d) *Charles Hurd*

Mrs. Mildred Lillian Davis testified that prior to the strike she performed assembly work in Department 425 under the supervision of Foreman Charles Hurd—that Foreman Hurd came to her work bench approximately two days before the strike started, and in the presence of Mary Webber and Ann Webber stated that if I went out on strike, I would not be coming back. Thereafter, on the day the strike started, Foreman Hurd inquired whether my husband was going out on strike, and said: "A lot of people are going to get hurt and a lot of people won't be coming back."

Mary Ruth Webber was called as a witness for the General Counsel, but did not mention the statements alleged to have been made in her presence by Foreman Hurd. Mrs. Webber testified that prior to the strike she was working in the assembly of manifold clusters under the supervision of Foreman Charlie Hurd, when he inquired what she was going to do if there was a strike, and she replied: "I will be on the picket line"; and he said: "Ha, you probably can hold the line down by yourself." Thereafter, she went to Foreman Hurd on the day the strike started, and said: "I am going out for a while. Are you going to miss me?" Thereupon, Foreman Hurd said: "You can go home and stay, and I hope you never get back."

Robert Nelson testified that prior to the strike he was performing assembly work under the supervision of Foreman Charles Hurd, and talked with him several times—that Foreman Hurd said: "The first week most of you will be out; and during the second week they will trickle back; and the third week probably the majority of them will be back; and if you are not back by then, you are never coming back." Nelson testified that thereafter he made a practice whenever he saw Foreman Hurd to say: "When am I coming back"; and Foreman said: "You elected to stay out on strike. I don't care if you ever come back, and that goes

for the rest of you, especially Joe Chamanski. He let me down."

In the foregoing statements alleged to have been made by Foreman Hurd to Mrs. Davis, Mrs. Webber, and Robert Nelson, the foreman appears to be expressing his own personal feelings about how he was being treated by employees in his department, but I find therein no threats of economical reprisal that could be attributed to the Respondent Company—I find, therefore, that Respondent engaged in no independent violation of Section 8(a)(1) through the conduct of Foreman Charles Hurd.

(e) *Roger Hall*

Mrs. Anna Palmer testified that prior to the strike she worked as an electronic assembler at Hamilton Standard under the supervision of Foreman Roger Hall—that, while leaving the plant on the day before the strike, she said to him: "Good night, and I will be seeing you. If we go on strike, we will see you after the strike." Foreman Hall looked up, and said: "Not if I can help it, you won't be seeing me." Mrs. Palmer further testified that approximately two months prior to the strike she talked to the Foreman about a merit rating grievance, and he said: "Ann you are too unionized and not enough company-wise, and some day you will pay for it."

The latter statement is too remote to be considered herein, and is also barred by the statute of limitations. The former statement is ambiguous, and in the opinion of the Trial Examiner neither of these remarks contain any threat of economical reprisal. Furthermore, I credit the denial of Foreman Hall rather than the testimony of Anna Palmer.

Roger A. Hall credibly testified that he was not at work or present in the plant during the week immediately preceding the strike that started on June 8, 1960;—that he left the job on Friday, June 3, 1960, and did not return until June 13, 1960—that on June 6, 1960, he received a death

call to visit his father-in-law at Clinton, Iowa, and was there when he died on June 7, 1960, which was the same day as the alleged discussion with Anna Palmer in Hartford, Connecticut, more than one thousand miles from where he actually was on that date. Hall swore positively that he never at any time made such statements to Mrs. Palmer; and from observation of these two witnesses, and from all the circumstances involved, I credit his testimony, and find that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act.

(f) *Daniel Taft*

Robert H. Richardson testified that he was employed as a leadman at Pratt & Whitney in Department 42 under the supervision of Foreman Daniel Taft—that approximately two weeks before the strike started, Foreman Taft said: "You belong to the Union. If you go out on strike you won't have a job."

Jane McLachlan testified that she worked as a tool-expediter under the supervision of Foreman Daniel Taft—that approximately one week prior to the strike, "Mr. Taft said if we took part in this strike, we would be apt to lose our jobs. Our insurance would be gone. The Company would set up cameras to record activities on the picket line. The Union would reduce our benefits from \$35 to \$10 a week." (tr. 1557.)

Daniel Warren Taft credibly testified that he was a foreman in Department 42 at the Pratt & Whitney East Hartford Plant in 1960, with 28 to 30 employees working under his supervision—that he never discussed the possibilities of a strike with any individual employee; but about one week before the strike, he called his entire group of employees together following their lunch period, and told them that Pratt & Whitney would continue to operate the plant by hiring other people to fill jobs left vacant by strik-

ers; and that strikers coming back to work might find their jobs filled by someone else; that it was strictly up to them whether they went out on strike, and that they would have to make up their own minds about that.

Foreman Taft further testified that he did not engage in any individual conversation with Robert H. Richardson, and positively did not make the statement attributed to him by Richardson.

Foreman Taft further testified that he did not engage in any individual conversation with Jane McLachlan, and did not make the statements attributed to him by her; and that, furthermore, he had had no knowledge whatsoever with respect to strike benefits to be paid by the Union or insurance provided for employees by the Company or plans to use cameras on the picket line.

From my observation of these witnesses, I credit Foreman Taft's version of statements made by him to employees, and discredit the testimony of Richardson and McLachlan as a biased interpretation and augmentation of remarks made by this foreman at the group meeting. I find from all the evidence and circumstances that statements made by Foreman Daniel Taft did not constitute interference, restraint, and coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act; and that Respondent did not thereby engage in an independent violation of Section 8(a)(1) of the Act.

(g) *Albert Paul Leone (Jr.)*

Alex A. Newell testified that he was working as a tool-expediter in Department 97 at Pratt & Whitney wherein *Albert Paul Leone* was a general foreman—that a few days prior to the strike, Leone said to him: "I'll tell you something. If you go out on strike, you will never work in this department as expediter." (tr. 887). Approximately two years later, after his re-employment by the Respondent,

when he was summoned as a witness in the instant hearing, he showed the subpoena to General Foreman Leone, who at first said that the subpoena was not legal, because it had not been served upon him by the sheriff, but later came back and asked to see it. Thereupon, Leone took the subpoena to the office of the plant superintendent, and shortly thereafter brought it back and said: "You can honor it. We'll let you go, but be careful what you say—Remember you were misled once." (tr. 890.)

Albert Paul Leone, Sr., credibly testified that he is a general foreman of semi-production in department 97 at the Pratt & Whitney East Hartford Plant; and was acquainted with *Alex A. Newell* (tool-expediter), but Newell did not work under his supervision and as general foreman he did not hire the tool-expeditors or have any control over their assignments to work.

General Foreman Leone positively denied making the statements attributed to him by *Alex A. Newell*, but admitted that Newell approached him with the alleged subpoena in his hand, and requested time off from work to attend this hearing—that he might have expressed some doubt of its legality before making an examination of the document, and took it to the Personnel Department for instructions—then brought it back to Newell, told him that it was a legal subpoena and that he should comply with it.

General Foreman Leone further testified that prior to the strike there were a lot of rumors, but he never discussed it with any employee, and did not attend any personnel meetings where it was discussed—that he was not interested in the Union one way or the other, and it made no difference with him; and he did not tell any employee that he would never work in the plant again if he went out on strike.

From my observation of the demeanor of the two witnesses, aforesaid, I find from all the circumstances and

the entire record in the case that the testimony of General Foreman Leone is more compatible with the truth of the situation, and I discredit the testimony of Alex A. Newell.

I find, therefore, that Respondent did not by the conduct of General Foreman Albert Paul Leone engage in interference, restraint or coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act or any independent violation of Section 8(a)(1).

(h) *Marcus Moriarity*

Mrs. Hilda Adamczyk testified that prior to the strike in 1960, she was working as a braser in Department 1221—that in May 1960 her Foreman Moriarity held a meeting in the department and told his employees that they would have to work until the (quitting) bell rang, and could not clock out ahead of quitting time—that there must not be any discussion of union activities on company time, and no grouping together for little chats. Moriarity said: "I don't care for so much mess and fuss. Get it over with, and get this thing settled one way or the other. Get it over with, get the thing settled, get settled down. When you come back in, we can check and work who we want to work."

Foreman Marcus Moriarity credibly testified that it was normal procedure to hold monthly or bi-monthly meetings of his employees, and that he probably held such a meeting in May 1960—that he told these employees that there must be no discussion of union activities on company time and property, and that there would be no clocking in early before time for work; but does not recall telling them to get it over soon, if they go out on strike; and that he positively did not make the statements attributed to him by *Mrs. Adamczyk* concerning employees coming back to work or selecting those that the Company wanted. Moriarity further testified that approximately 40 people worked under his supervision including *Hilda Adamczyk* and 4 or 5 other

brasers; but all hiring of his employees was handled by the Personnel Department.

I find no threat of reprisal in the statements alleged by *Adamczyk*; and from my observation of these witnesses and from all the circumstances and record in the case give full faith and credit to Foreman Moriarity's version of what he said at the meeting. The testimony of *Mrs. Adamczyk* was not corroborated by any other witness, although the record indicates that approximately 35 or 40 people were present at this meeting. I find, therefore, no interference, restraint or coercion of employees by reason of statements made by Foreman Marcus Moriarity, and thereby no independent violation of Section 8(a)(1).

(i) *Tracey Page*

Wilhemina Wilcox testified that in June 1960 she was working at Hamilton Standard, and went out on strike for the duration; that approximately 1 week prior to the strike, one Tracey Page from the personnel department spoke to her at the "burr bench," and said: "Billy, don't go out on strike, because if you do, you will be sorry."

Such a statement could just as properly have been made by a member of *Mrs. Wilcox's* family, her best friend, or any well wishing associate, rather than a supervisor of the Respondent. It contains no threat of reprisal by anyone; and the record fails to show whether Tracey Page held any supervisory position with the Company. I find no interference, restraint or coercion and no independent violation of Section 8(a)(1) by reason of such statement by *Wilhemina Wilcox*.

(j) *George Sabisky*

Guy De Mascolo testified that in June 1960 he was working in Department 957 at Pratt & Whitney under the supervision of Foreman George Sabisky—that approximately 1

week prior to the strike said to him in the presence of two other employees (Allen Alimone and John McCullen): "In a few days the employees may go out on strike—that we may go out on strike, but we better not be the last ones in."

Neither Allen Alimone nor John McCullen were called to corroborate the witness De Mascolo; and I find no threat of economic reprisal by the Respondent in the aforesaid statement. Furthermore, from my observation of the demeanor of this witness and from all the circumstances allegedly surround this incident I cannot credit his testimony by finding a preponderance of evidence to support any finding of an independent violation of Section 8(a)(1) by the Respondent.

(k) *Michael Reardon*

Gerald Rosa testified that in June 1960 he was a union steward working as a prop-assembler at Hamilton Standard; and he was designated as the union representative to give the signal in Department 213 to walk out at 10:40 a.m. on June 8, 1960; that General Foreman Reardon asked him, as he was leaving, if he was walking out on strike, and said: "Once you walk out of here, I will personally see to it that you never walk back into Hamilton Standard."

Michael Reardon credibly testified that in June 1960, he was a general foreman of Departments 13 and 213 at the Windsor Locks plant of Hamilton Standard, in a working area separated from the rest of the factory by a wire fence, with the timeclocks situated immediately outside the entrance to this fenced area. Reardon testified that the walk-out caused much commotion and milling around within this fenced area, because some employees would clock out and then come back in, thereby interfering with others still at work, so he approached a group of the strikers, and said: "If you are going out, go ahead—don't keep coming back into the area." When making this statement to the strikers, General Foreman Reardon does not recall seeing Gerald

Rosa, but positively denied having any conversation directly with him or making any statement to *Rosa* or anyone else to the effect that he would personally see that anyone walking out of here would never walk back into Hamilton Standard.

The testimony of *Gerald Rosa* was not corroborated by any other witness; and from my observation of the demeanor of the two witnesses, and from all the circumstances of the case, I credit the testimony of *Michael Reardon* rather than that of *Gerald Rosa*. From a preponderance of the evidence, I find that Respondent by the conduct of General Foreman Reardon did not interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any violation of Section 8(a)(1).

(l) *Carl Edward McAllister*

Frank Lombardo testified that prior to the strike in 1960 he was working as an electrician helper in Department 27 at Pratt & Whitney under the supervision of Foreman Red Barnes, and frequently made announcements for the Union over Radio Station WINF, and relate thereon what he observed; that approximately 1 to 2 weeks after the strike started he went to the home of General Foreman Carl McAllister to talk to him about the strike, and during their conversation McAllister said: "What are you, some kind of nut, going on the radio and shouting your mouth off. You will never get a job back at Pratt & Whitney."

Carl Edward McAllister credibly testified that in June 1960, he was a general foreman in Area 4 at the East Hartford plant of Pratt & Whitney, but had no jurisdiction over *Frank Lombardo*;—that in the evening of June 10, 1960, his Chevrolet station wagon was badly damaged by the mob while driving through the picket line leaving the plant; and when he got home that night, *Frank Lombardo*, *Ronnie Nevison* and another employee by the name of *Duggan* were

outside in his driveway. Thereupon, Frank Lombardo said: "I see they give you a rough time when you come through the picket line tonight. You've got a busted window. Better luck next time—maybe they'll break your wind shield." Thereupon, I latched on to him, and the other two fellows took off. The only thing I said to him was "that I'd help break the wind shield, as he suggested that they might do next time; and did not say anything to the effect that he would never get a job back at Pratt & Whitney.

General Foreman McAllister positively denied under oath that he made the statements attributed to him by Frank Lombardo, and no other witness was called to corroborate Lombardo's testimony. From my observation of these two men and their demeanor on the stand, I give full faith and credit to McAllister, and do not believe the testimony of Lombardo. From a preponderance of the evidence and all the circumstances of the case, I find that by the conduct of General Foreman McAllister when so brashly approached on his own premises at home by Lombardo and other strikers on the night of June 10, 1960, Respondent did not interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

(m) *Raymond Pelletier*

Evo Lazzerini testified that he worked several years as a scraper and fitter for Pratt & Whitney at East Hartford, Connecticut, but was absent on personal business with the Veterans Administration at time of the strike in 1960, and never returned to work. However, he engaged in picketing, and at the plant gate saw and heard General Foreman Pelletier say that "if we came in he would terminate us"; thereupon, he walked across the street to face the general foreman on the sidewalk, and Pelletier said: "Boy, if you come in I'll terminate you"; that later during the strike, General Foreman Pelletier called him by telephone,

and said: "I'd appreciate it if you get some of the boys together and come in (to work); but I told him that I would take my chances to stay out, because I did not care to be a scab. Prior to that Pelletier had asked me to come back to work across the picket line. When I went in to register after the strike, General Foreman Pelletier said: "it may not do you any good"; and I said: "Well, let Pratt & Whitney be the judge of that; "but when I received a letter from the Company about January 6, 1961, I notified them that I did not care to go back into Industry, and wanted something a "little more soft."

John Telesmanic testified that during the 4th or 5th week of the strike, General Foreman Pelletier called him by telephone, requested him to come back to work, and said: "You can come in any time in the morning, work as many hours as you want—i.e. overtime.

The finding of the Trial Examiner is that the foregoing conduct alleged by John Telesmanic does not constitute a threat of economic reprisal, and is not an independent violation of 8(a)(1).

Andrew Kalafut testified that he had been employed in a variety of jobs at Pratt & Whitney since 1934, and was assigned to light work after incurring a disfiguring injury to his hand in line of duty about 4 years prior to the strike; that while engaged in picketing during the 4th or 5th week of the strike alongside the East Hartford plant on Willow Street next to the fence, he heard General Foreman Pelletier say: "Come on in, I'll terminate the whole bunch of you."

Dominick Rubbo testified that during the 3rd week of the strike, he received a telephone call from General Foreman Pelletier saying that he would terminate me if I did not come back to work; and I told him that he had a lot of nerve calling my house to threaten me about my job. Thereafter, about the 6th week of the strike, while engaged in picketing

at Willow Street, he saw General Foreman Pelletier, and heard him yell at the pickets: "Come on in and I will terminate you." Pelletier has since died.

Herve Desriusseaux testified that on one occasion during the strike, he was in a group of strikers on the picket line at Gate #3, and spoke to General Foreman Pelletier who was just inside the fence on company premises—that Pelletier heard him call somebody "a scab," and invited me to come in—that he would terminate me. He saw Pelletier again at Willow Street on the registration day for strikers, and Pelletier said: "Herve, you look good after being out on strike." General Foreman Pelletier is now dead.

General Foreman Raymond Pelletier died at some time in 1966, thereby depriving the Respondent of the only witness that could answer the testimony of witnesses for the General Counsel and Charging Party. Prior to his death there was no opportunity to obtain his deposition, because the allegation concerning him in Paragraph 37(a) recites only the following information: "Raymond Pelletier—sometime June-August 1960." There is a very wholesome rule of evidence that evidence concerning conversations and transactions with a dead man are not admissible, especially where he had no opportunity prior to his death to deny or explain his version of the transaction. The testimony of *Lazzerini*, *Kalafut*, *Rubbo* and *Desriusseaux* is suspect in the emphasis placed on the word terminate, indicating that they had been instructed concerning the importance of this word to prove a threat of economic reprisal by the Respondent. Furthermore, the manner and occasion on which it is alleged to have been used in yelling at strikers walking a picket line was ambiguous, because it was not at all necessary to get the strikers to come inside the plant to be terminated. Termination is either voluntary or involuntary, and if Respondent wished to terminate strikers it could easily do so unilaterally, and normal pro-

cedure would be to follow that course rather than publicly proclaim such an intent from the housetops for all to hear.

The Trial Examiner will therefore invoke the rule of evidence to disqualify testimony against a dead man, and also find that the statements alleged are also too ambiguous to constitute a threat of economic reprisal by Respondent against its employees already on the picket line. Therefore, Respondent did not engage in an independent violation of Section 8(a)(1) by the alleged statements of General Foreman Raymond Pelletier (now deceased).

(n) *Charles Kaler*

Evo Lazzerini testified that in 1960 he was working under the supervision of Foreman Charles Kaler, but was absent when the strike started—that sometime during the strike, Foreman Kaler called him by telephone at home, and requested him to get some of the boys together at his house for a conference, but he refused to hold such a meeting at his home, and suggested that such a meeting be held at the Union Hall; but Foreman Kaler did not like that suggestion, and said: "When this strike ends up, you may be one of the fellows outside looking in." He told Foreman Kaler that he would take his chances on that. Foreman Kaler told me to "get four or five scrapers and call him or Mr. Pelletier—that they would be glad to come to my house and talk to us"; also told me about Torin and Getz putting a nail in their coffin, but did not explain what he meant.

Dominick Rubbo testified that prior to the strike he worked as a precision scraper in Department 33 at Pratt & Whitney under the supervision of Foreman Charles Kaler. During the 5th or 6th week of the strike, Foreman Kaler called me by telephone, and said: "if you scrapers don't come back we are going to take this work and ship it out to different factories, and you won't have no job." I told him that I was on strike, and that he had no business calling my house."

Foreman Charles Kaler testified that he was foreman in the Machine Repair Department #33 at Pratt & Whitney with 25 to 30 employees under his supervision. He was instructed by General Foreman Raymond Pelletier during the strike to call employees and request them to return to work, but not to threaten them in any manner whatsoever. So he called many of them, and may have suggested that they talk it over among themselves, but never requested a meeting for him to talk with them; and did not tell Lazzerini or any other employee that "if he failed to come in, you might find him on the outside looking in when the strike was over; and did not mention Paul Tongrin in any conversation with Lazzerini. He called Rubbo by telephone, told him that we had work to be done, and requested him to come back, but did not tell Rubbo that his work would be sent out if he did not return to work; and did not tell any employees that their work would be taken by a replacement if they didn't come back to work.

From my observation of the demeanor of these witnesses I am persuaded that Foreman Kaler's testimony should be credited to the effect that he did not threaten employees by telling Lazzerini that when the strike ended he might be one of the fellows outside looking in, or by telling Rubbo that if the scrapers don't come back they would not have a job. The testimony of Evo Lazzerini and Dominick Rubbo was not corroborated by any other witness. It is the veracity of one man against another in each instance, and I am convinced that Foreman Kaler was telling the truth while Lazzerini and Rubbo by deliberate misinterpretation or addition of a few extra words tried to change honest persuasion of employees to voluntarily return to work into inducement by threats of economic reprisal to return involuntarily to work. I find, therefore, that there was no independent violation of Section 8(a)(1) in the conduct of Foreman Charles Kaler.

(o) *Foreman Ackerberg (George Ecabert)*

Valente Gallucci testified that in June 1960, he was employed as a carpenter and maintenance worker in Department "39" under the supervision of Foreman George Ecabert, and shortly prior to the strike had a conversation with this foreman concerning overtime; whereupon, Foreman Ecabert said: "Why do you want to be a troublemaker? You caused all this trouble." This incident occurred at the second step of the contractual grievance procedure, following two previous grievances about overtime. This witness testified further that during the strike Foreman Ecabert called him by telephone, and said: "If you don't come back we are going to put somebody in your place." At a later date about October 1, 1960, I had a talk with Foreman Ecabert, and he said that I should have returned to work when he called me.

From the foregoing testimony of Gallucci it is apparent that this supervisor was simply interested in persuading his employee to come back to work, and made no threat of economic reprisal whatsoever. Telling an employee that he would be replaced if he failed to report for work is simply the expression of the legal right to obtain permanent or temporary replacements for striking employees, which in the absence of discrimination within the meaning of Section 8(a)(3) does not constitute an independent violation of Section 8(a)(1). I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

(p) *William Dwyer*

Earl C. Martin testified that prior to the 1960 strike he was working as a Blade Inspector in Department 7 at Hamilton Standard, and that his experience was limited to approximately 1 dozen of approximately 1,500 component parts contained in a propeller blade; that by reason of a newspaper advertisement in April 1961; he called Person-

nel Advisor William Dwyer about one of those jobs, and was told by Dwyer that those Ads were for inspector jobs for which he was not qualified; and about 2 months later, he again called Dwyer about jobs advertised for in the newspaper, and Dwyer said: "Well, they are not for you. They are for men of different experience. By the way, weren't you one of the 200 who signed a statement against the Company?"

William F. Dwyer credibly testified that he was Senior Personnel Advisor at the Windsor Locks plant of the Hamilton Standard Division, and recalled telephone calls received by him from Earl C. Martin during the Spring of 1961; that Martin was inquiring about the prospect of being rehired at Hamilton Standard and referred to advertisements seen in the newspapers. Thereupon, he told Martin that he was not qualified for the particular positions available at that time. Dwyer further testified that he had no knowledge or information that 200 employees had signed any statement against the Company, and positively did not mention that subject or say: "By the way, weren't you one of the 200 who signed a statement against the Company."

From my observation of the witnesses (Martin and Dwyer), I discredit the testimony of Martin and give full faith and credit to Dwyer's denial of the aforesaid statement attributed to him about Martin signing any statement against the Company. Consequently, I find therein no independent violation of Section 8(a)(1) by Respondent. The allegations of Paragraph 37(a) of the complaint pertain only to independent violations of 8(a)(1); and discrimination against all employees is covered in other allegations in the complaint as to violations of Section 8(a)(3), including any derivative violations of 8(a)(1).

Milford Dearborn testified that prior to the 1960 strike, he was working as "chip man," shoveling metal chips into a 3-wheel cart or wheelbarrow and dumping them into a hopper; having been removed from office maintenance work

when it was discovered that I had a hernia. After the strike about January 1, 1961, I was called to the plant and offered a job as office janitor, and sent to the Medical Department for a physical examination. There, my hernia was discovered, and I was requested to sign a waiver similar to one previously signed prior to the strike; and thereupon, I was given a card with which to report to Department #39. Thereupon, I was called in to see Bill Dwyer; and he said that they could not use me on account of my hernia because this new job required the lifting of weights beyond the limits permitted by the doctor; and also said: "If I hadn't gone out on strike, they would have kept me on the job—but seeing I had gone on strike they would have to let me go because of my hernia."

William F. Dwyer testified under oath that he did not recall talking to Milford Dearborn in January 1961, and certainly did not tell Dearborn or any other employee that he would have been kept on the job if he had not gone out on strike, and did not say that "since they had gone on strike, I'd have to let him go because of some physical defect."

From my observation of the demeanor of the two witnesses (Dearborn and Dwyer), and from all the circumstances of the case, I discredit the testimony of Milford Dearborn, and give full faith and credit to the denial of William F. Dwyer that he made the statements attributed to him as being the reason for the Respondent refusing to rehire Dearborn in January 1961. I find no independent violation of Section 8(a)(1), as alleged in Paragraph 37(a) of the complaint; and discrimination against Dearborn, if any, is covered by other allegations with respect to violations of Section 8(a)(3) including derivative violations of Section 8(a)(1).

Joseph Motyka testified that prior to the 1960 strike, he worked as an O.D. grinder in the toolroom in Department 219 at Hamilton Standard, and at one time was a union steward for a period of 3 years from 1955 through 1958;

that he went on strike for the duration, and thereafter registered under the strike settlement agreements, and also filed new applications for employment in January 1961; that he discussed the matter with Bill Dwyer in August 1962, and Dwyer said that he would do everything humanly possible for me because my wife was hospitalized—that he would rather employ the older help that went out on strike by reason of their experience—that it would be much better all around than hiring new employees.

It does not appear necessary to make a credibility finding between the testimony of Joseph Motyka and William F. Dwyer because on its face this evidence does not support a finding that such statements constitute threats of economic reprisal or any other act of interference, restraint or coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act. Dwyer did not remember any such conversation with Motyka, and appeared unable to recall the identity of the man. If any discrimination against Motyka is claimed by the General Counsel and Charging Party it is covered by other allegations of the complaint; but as to the allegation in Paragraph 37(a), I find there was no independent violation of Section 8(a)(1) by the Respondent.

Gerald Rosa testified that he was engaged in picketing at the Main Gate, and that Bill Dwyer made a practice of coming there each day at 9:00 a.m.; and on one occasion called him over to his position, and inquired: "When are you fellows going to give up? Don't you know you are beat? Don't you see the new faces coming in the gate?" This witness further testified that during the registration of strikers, Bill Dwyer looked over his application for reinstatement, and said: "Oh Hell, Rosa it is you. You might as well leave. We don't have anything for you."

William F. Dwyer credibly testified under oath that he could not recall any discussion with Gerald Rosa during the 1960 strike; and positively denied making any such

statement attributed to him about the strikers giving up and accepting defeat. Dwyer also testified that he could not recall having any conversation with Rosa during the registration of strikers at the end of the strike, and positively denied making any such statement attributed to him at that time. Dwyer credibly testified further quite to the contrary that he at all times publicized the fact that they were requesting these strikers to come in on two particular dates to register under terms of the Strike Settlement Agreement; and on all occasions the union representatives sat at adjoining tables to insure a fair and proper registration of all strikers participating therein.

From my observation of these two witnesses (Rosa and Dwyer) on the witness stand, and from the entire record in the case, and in the absence of other corroborating witnesses, I discredit the testimony of Gerald Rosa, give full faith and credit to the denial of William F. Dwyer, and find that a preponderance of the evidence fails to show that Respondent engaged in interference, restraint or coercion of employees by reason of the statements attributed to Senior Personnel Advisor William F. Dwyer. I find therein no independent violation of Section 8(a)(1), as alleged in Paragraph 37(a) of the complaint.

Francis M. McCann testified that he formerly held official positions in the Union as steward, committeeman, member of the negotiating committee, chairman of the organizing committee, and assistant strike chairman in charge of picket duty; that during the second week of the strike in a conversation at the Main Office Gate, he made a remark to the effect that this was a beautiful summer day; and in reply thereto William F. Dwyer said "it might be a long cold winter before you get back in."

The foregoing incident could not be recalled by William F. Dwyer, and he testified under oath that he never made such a statement to McCann or to any other employee. Some timid and sensitive souls might discern in such a

statement some element of interference, restraint of coercion, but I fail to find it, and see no necessity for making a credibility finding between the testimony of these two witnesses. The statement, if made, and correctly interpreted is too ambiguous and lacking in the elements of a threat of economic reprisal to justify a finding of interference, restraint or coercion of the strike leader on the picket line on this alleged occasion; and the preponderance of the evidence is to the contrary. No witness was called to corroborate the testimony of McCann, and the burden is on the General Counsel to prove his allegation by a preponderance of evidence. Having failed to do so, I find that Respondent did not thereby engage in an independent violation of Section 8(a)(1), as alleged in Paragraph 37(a) of the complaint.

(q) *George Bentley*

Robert H. Richardson testified that in June 1960 he was working as a leadman in Department 42 at Pratt & Whitney under the supervision of Foreman Daniel Taft, and George Bentley was the general foreman; that on the morning of June 8, 1960, he walked out on strike and passed within 14 feet of Taft and Bentley standing together; and in passing he heard General Foreman Bentley say to Foreman Taft: "You won't see them any more." Richardson testified further that in September 1960 he called General Foreman Bentley about going back to work, and Bentley said: "We don't intend to call you back."

George R. Bentley credibly testified that he was a general foreman in Department 42 at the Pratt & Whitney East Hartford plant; and on the morning of June 8, 1960, Foreman Taft reported to him by telephone that his employees were milling around in the plant. Thereupon, he reported this situation to the Personnel Department, and received instructions to tell these people to either clock out or go to work. Thereupon, he and Foreman Taft stood in

the center of the department area and told them just that; whereupon, some of the employees clocked out on strike, and some went back to work; but he did not talk individually to any of the employees leaving the plant, and did not discuss the matter any further with Foreman Taft. Bentley swore positively that he did not make any such statement to Foreman Taft or to anyone else as that attributed to him by Richardson. Bentley further testified that Richardson did thereafter call him by telephone in September 1960 from some place where jazz music could be heard in the background, making it hard to understand what Richardson was saying over the telephone; but he understood that Richardson was inquiring about coming back to work, so he told Richardson that it would be necessary for him to check with the Employment Office; and he also reported this conversation to the Personnel Department next morning. Bentley swore positively that he did not tell Richardson that they did not intend to call him back. Furthermore, he did not know what had happened to Richardson's job, and did not have a list or schedule of strikers being recalled to work, but knew that Richardson could contact the Personnel Department about the matter.

In my opinion the statement (even if true) alleged to have been privately made to Foreman Taft by General Foreman Bentley, and overheard by an employee, does not constitute a violation of Section 8(a)(1). The testimony of Richardson was not corroborated by any other testimony or evidence. From my observation of these two witnesses and all the circumstances of the case; I discredit the testimony of Robert H. Richardson, and give full faith and credit to the denial of General Foreman George R. Bentley; and since the burden of proof rests upon the General Counsel, I cannot, in any event, find from a preponderance of the evidence that Bentley made any such statement. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any inde-

pendent violation of Section 8(a)(1) as alleged in Paragraph 37(a) of the complaint. With respect to a statement in September 1960 to the effect that "they did not intend to take them back," the testimony is likewise discredited and full faith and credit given to the denial thereof by General Foreman Bentley; and since there was no corroboration of Richardson's testimony, I cannot, in any event, find from a preponderance of the evidence that Bentley made any such statement or that the Respondent thereby interfered with, restrained or coerced employees in the exercise of their rights under Section 7 of the Act or thereby engaged in any independent violation of Section 8(a)(1) as alleged in Paragraph 37(a) of the complaint.

(r) *William Slaffenhaffer (William Schladenhaufen)*

Joseph M. Heck testified that in 1960 he was working as a vertical turret operator at Pratt & Whitney under the supervision of Foreman Joe Smith, but at sometime prior to that time had worked under the supervision of Foreman Bill Schladenhaufen in Department 97. He went out on strike for the duration, and thereafter in September 1960 went to the plant in company with Walter Wolczak to turn in his badge. They conversed with Foreman Schladenhaufen at his desk in Department 97, and inquired about coming back to work; whereupon, Foreman Schladenhaufen said: "If you fellows ever come back to Pratt & Whitney, it won't be in Department 97. It will be in some other area."

Walter Wolczak testified that he was also working as a vertical turret lathe operator at Pratt & Whitney when he went out on strike June 8, 1960, for the duration, and thereafter registered in August 1960 for reinstatement under the terms of the Strike Settlement Agreements. Thereafter, in company with Joseph Heck, he went to the plant in September 1960, got his tool box, turned in his badge to Foreman Joe Smith; then went in to see Foreman Schladenhaufen, and asked him if there was any chance of coming back to work; whereupon, Foreman Schladenhaufen

said that if we ever got back we would not get back to that department.

William Schladenhaufen credibly testified that in 1960 he was a foreman in Department 97 at Pratt & Whitney, and that Joseph Heck and Walter Wolczak were working under his supervision when they went out on strike on June 8, 1960. After the strike these two employees came in the plant together in September 1960 to turn in their tool boxes. They inquired why they could not go back to work, and I told them that their jobs had been permanently filled with either trainees or transferees and no longer existed; that they could apply for another job at the Employment Office; and I recommended that they go over there and do so at once. Thereafter, Wolczak came back to work in the latter part of 1960, and is still at work in Department 96 where he had formerly been employed. When they applied in September 1960, my department had a full complement, and there were no openings to be filled.

The testimony of Heck and Wolczak appears more pertinent to the discrimination section of this case rather than an independent violation of Section 8(a)(1); and this Trial Examiner should be required to adjudicate aforesaid incident only as alleged discrimination in violation of Section 8(a)(3) and derivative violation of Section 8(a)(1), and not as a duplicate adjudication as an independent violation. The Trial Examiner has already found discrimination by the Respondent with respect to unidentified transfers, promotions prior to January 1, 1961, and as to hiring new employees during the period January-April 1961, inclusive, and recommended a method of identification in the absence of an agreed identification by the parties. In any event, from my observation of the witnesses and from all the circumstances of the case, I credit Foreman Schladenhaufen's version of what he told Heck and Wolczak when they came to see him in September 1960, rather than the misinterpreted and ambiguous version imposed upon this conversation

by self-interested witnesses testifying as to their recollection more than 5 years after it occurred. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did not thereby engage in an independent violation of Section 8(a)(1).

(s) *Foreman Postum (William E. Postal)*

Joseph Shemanski testified that he was working as a leadman (labor grade 6) in the fuel manifold department at Pratt & Whitney when he went out on strike for the duration on June 8, 1960; and was recalled to work on the first shift in labor grade 8 on October 31, 1960. Thereafter, in February 1961, he asked General Foreman William E. Postal why he had been by-passed by giving another man his former job as leadman on the third shift; that Postal said that I had been considered—that either I was company or I was union, and that management takes the position of promoting loyal company men. Shemanski further testified that several days later he asked General Foreman Postal how promotions were made, and he stated that they were made by seniority, ability, and proven loyalty—that he never saw a check issued by the Union—it was always signed by the Company—that I did a good job keeping the people out on strike—that it was a proven fact, if the leadman came back, 90 percent of the people would follow—that they had a poor showing in my department during the strike—that it was a known fact that I ate lunch with a striker. Thereafter, in May 1961, Shemanski was promoted to leadman, labor grade 5, in the same job held by him prior to the strike, except it was one grade higher than before.

William E. Postal credibly testified that in 1960 he was general foreman for Departments 424, 425, and 651 at the East Hartford plant of Pratt & Whitney; and is presently Division Superintendent for Area 4 at that plant; and prior to the 1960 strike, Joseph Shemanski worked as a leadman in Department 425. Shortly after the strike Shemanski went

back to work as a manifold assembler; but it was reported to me by his foreman that Shemanski was uncooperative and was frequently warned and reprimanded concerning his poor attitude on the job—that he refused to work with employees unless they were strikers; and partly for that reason, Shemanski was not promoted back to leadman at that time. In February 1961, Shemanski approached me on two successive days, aggressively inquiring why he had not been given consideration for promotion to the job of leadman, and trying to get me to commit myself. In the first conversation, I told him that he had been given consideration, but was not selected because from his attitude on the job we did not find him capable at that time of doing a real leadman's job. I told him that in general, we promoted people on the basis of seniority and demonstrated ability and skill. Then he came back to my office next day, and inquired whether I felt that he had the necessary skill for the leadman job. Thereupon, I told him that his craftsmanship was excellent, but that his attitude on the job was such that I just couldn't see him being put in a position where he would have to deal with a new group of people from various backgrounds, some of whom had been out on strike, and some who had not—that it was very obvious that he would not associate with or talk to those who had not joined the strike, and that he could not do a job requiring communication with a group in which there were only a few individuals that he would talk to—that under these circumstances, I could not use him as a leadman. Shemanski, had been a leadman under my jurisdiction for a period of several years prior to the strike; and approximately 3 months after the aforesaid conversations, he was again promoted to a leadman's job in Department 425 in a higher labor grade. General Foreman Postal further testified under oath that he did not make any such statement as that attributed to him by Shemanski to the effect that he was either company or union, and that management takes the position of promoting loyal company men; and did not include "proven loy-

alty" in his statement to the effect that the basis of promotions in general was seniority and demonstrated ability and skill.

The foregoing testimony of Joseph Shemanski appears more pertinent to the discrimination section of this case, including a derivative violation of Section 8(a)(1), and a duplicated adjudication thereon as an independent violation of 8(a)(1) would be entirely improper in the opinion of this Trial Examiner. However, from my observation of these two witnesses (Shemanski and Postal). I discredit the version placed upon his conversations with this general foreman, and give full faith and credit to the denial of William E. Postal that he made the statement attributed to him. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

(t) *Robert Backus*

William Wallace testified that in June 1960 he was employed as an experimental inspector in Department 207 at Hamilton Standard, and went out on strike for the duration; that on the day after the picket line was reduced by an order of Court at the end of the 1st week of the strike, Foreman Robert Backus called him by telephone, and said: "We have reduced the number of people on the picket line. I would like to have you come in to work. You shouldn't have any trouble. Well, I think you would be smart if you came in now."

In the above testimony of William Wallace, I find no element of interference, restraint or coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act; and therefore, find that Respondent did not thereby threaten employees with economic reprisal for engaging in union or other protected activities; and did not engage in any independent violation of Section 8(a)(1) as alleged in Paragraph 37(a) of the complaint.

(u) *Foreman Hajak (Frank Hejuk)*

Lucian LaRose testified that in 1960 he was working as a leadman in Department 19 at Hamilton Standard on the first shift, and went out on strike for the duration; that more than a month later, Foreman Hejuk called him by telephone and said: "You fellows seem to be keeping the rest of the setup men (out)" and why don't you get the bunch together and walk in tomorrow; and that I would lose my job, because they had to hire someone to take it.

I find in the above testimony of Lucian LaRose no threat of economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. Such a statement, if made by Foreman Hejuk was no more than a plea for this employee to return to work coupled with a true statement of Respondent's legal right to hire a permanent replacement in his job. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1), as alleged in Paragraph 37(a) of the complaint.

(v) *William Grennan*

Lucian LaRose further testified that about the end of the second or third week of the strike, General Foreman William Grennan called him by telephone, and said that "I'd better come to work, because *now* (emphasis added) they would have to hire someone to take my place. I'd think it over if I was you."

In the foregoing testimony of Lucian LaRose, I find no threat of economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint; and, therefore, find that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the

Act, and did not thereby engage in any independent violation of Section 8(a)(1) of the Act.

Howard F. Peters testified that in 1960 he was employed as a toolmaker in Department 219 at Hamilton Standard, and went out on strike for the duration; that sometime thereafter in July 1960, he called General Foreman William Grennan by telephone to inquire about the strike situation and Grennan said: "All I can say, if you do not get back here very very shortly, your job will be eliminated."

In the foregoing testimony of *Howard F. Peters*, I find no threat of economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint; and find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, and did not thereby engage in any independent violation of Section 8(a)(1).

William Francis Grennan credibly testified that prior to January 1, 1960, he was a general foreman in Departments 219 and 237 at the Windsor Locks plant of Hamilton Standard; and at that time and place, *Howard F. Peters* worked as a toolmaker under his supervision. Then he was transferred to Departments 19 and 37 in another building and General Foreman Henry Stokes took over his previous job and all personnel working therein. When the strike started on June 8, 1960, *Peters* was not working under his jurisdiction; but *Lucian LaRose* was working as a leadman in his Department 19. After the strike had continued for 2 or 3 weeks, he called *LaRose* by telephone and requested him to come back to work; told him that we were hiring replacements, and said: "I would think about it, Louis, if I were you," but did not threaten him in any manner or use the words attributed to me in his testimony. He was calling *LaRose* and other cutter-grinders on behalf of the Cutter Foreman *Frank Hejuk*, who was absent sick at home for approximately 2½ months during the entire period of the

strike. I was authorized by Superintendent *Louis Hornath* to request employees to come back to work, but he specifically instructed me to tell them the truth and not to threaten them in any way whatsoever; and I followed these instructions to the letter.

This witness testified further that about 1 month after the strike ended, *Howard F. Peters* called him by telephone, and inquired whether there were any jobs open; whereupon, he told *Peters* that he was trying to take care of the employees in his own departments under the terms of the Strike Settlement Agreements; explained to *Peters* that he was under the jurisdiction of another general foreman and should get in touch with him; but did not make the statement attributed to him in the testimony of *Peters*.

A preponderance of the evidence herein fails to prove that General Foreman Grennan threatened employees with economic reprisal for engaging in union or other protected activities; and I find, therefore, that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of their rights under Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

(w) *Superintendent Howatt (Louis Horvath)*

Lucian LaRose further testified that at sometime during the strike, Superintendent *Louis Horvath* stopped his car at the picket line, and said to him: "You'd better hang on to that sign you are carrying. You're going to need it to heat your home this coming winter."

There appears to be no connection between the above remark and the employment of this witness, because he did not work under the supervision of *Louis Horvath*, and did not furnish sufficient identification to enable the General Counsel to spell his name correctly in the complaint. I find in this testimony a simple banter of a picket in passing, with no threat of economic reprisal whatsoever for engaging

in union or other protected activities. The incident is too isolated and frivolous to warrant a finding of any violation of the Act.

I find, therefore, that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1). The only response from the picketing employee was a smile, at least showing in a bad situation a sense of humor on the part of both LaRose and Horvath, and no display of temper whatsoever.

(x) *Foreman Chenier (Eugene Chenier)*

Michael Martohue testified that he was working as a lathe operator in Department 31 at Hamilton Standard when he went out on strike in June 1960; that approximately 1 week prior thereto, Foreman Eugene Chenier told him that he would have a lot to lose, if he went out on strike.

I find in the foregoing testimony only the isolated remark of a foreman interested in the mutual welfare of his employer and its employees containing no threat whatsoever of economic reprisal for engaging in union or other protected activities. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act of engage in any independent violation of Section 8(a)(1).

(y) *Foreman Gus Holderman (Gus Olderman)*

Mrs. Stephanie Bakulski testified that she worked on the "burr bench" in Department 203 at Hamilton Standard, and went out on strike in June 1960; and thereafter about the 4th week of the strike her Foreman Gus Olderman called her at home by telephone, whereupon a conversation ensued, as follows: "He said 'Have you got your

housework done?' I said 'No.' He said "Hurry, up and do it. We need you in here. This is Cass [Gus] Uldermann [Olderman].' Well, I kind of hemmed and hawed. I told him our driver wasn't in. He said there was other workers and if I needed protection not to be afraid to come in, so he says, 'You know, we are counting on cutting down, and if you don't come in, you might find yourself out of a job.' I says, 'I need the job. I wouldn't want to lose my job,' and he says, 'Well, I wouldn't want to have it on my conscience that I didn't let you know.'

I find in the aforesaid testimony no threat of economic reprisal for engaging in union or other protected activities. It portrays the desire of a friendly foreman trying to protect both the interests of his employer and also the rights of an employee to be protected from violence if she desired to work, and by affording her an opportunity to prevent loss of her job by legal replacement or elimination. I cannot detect in this conversation any threat, effort or desire by this foreman to punish, penalize or inflict economic reprisal of any kind upon this or any other employee; and surely under the circumstances surrounding this conversation, no ulterior motive should be imputed to the Respondent Corporation. I find, therefore, that Respondent did not engage in any independent violation of Section 8(a)(1), as alleged in Paragraph 37(a) of the complaint.

(z) *Foreman Maxwell (James Maxwell)*

Stanley T. Zubeck testified that he was employed at Hamilton Standard, and went out on strike in June 1960; that about 2 weeks later Foreman Maxwell called him by telephone, and said: "If you want your job, you got to come back to work."

In the foregoing testimony I find the alleged statement of Foreman Maxwell insufficient to threaten employees with economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint.

It is well established that an employer has the legal right to hire a temporary or permanent replacement for striking employees in order to keep his business in operation; or he may for justifiable business reasons free of discrimination abolish such jobs. Therefore, the warning of a foreman, interested in preserving the jobs of his employees and maintaining operations within his jurisdiction, that a job may be lost by permanent replacement or elimination does not in the absence of other supporting evidence constitute a threat of economical reprisal; and the burden is on the General Counsel to prove the violation by a preponderance of the evidence.

James W. Maxwell credibly testified that he was a foreman in Department 23 at the Windsor Locks plant of Hamilton Standard during the 1960 strike; that he was instructed by his superiors, General Foreman Clark and Superintendent McIntosh to call and encourage employees to come back to work, but not to threaten or promise them in any manner whatsoever. When he called individual employees, most of them would forthwith inquire about the situation at the plant and who had returned to work; and all of his conversations with them were on a very friendly basis. Among others, he called Stanley S. Zubeck from his desk in the plant, reviewed the situation and told him who was back at work, and encouraged him to return to work; but he did not say "If you want your job, you'd better come back." In talking to these employees he never mentioned wages, overtime, shifts, or anything like that; and never told any employee they would lose their jobs.

From my observation of the witnesses, Zubeck and Maxwell, and from all the circumstances of the case I discredit the testimony of Stanley T. Zubeck with respect to the statement attributed to the foreman; and I give full faith and credit to the testimony of Foreman James Maxwell and his version as to what was said in his conversation with Zubeck. Therefore, I cannot find from a preponderance of

the evidence that Respondent threatened employees with economical reprisal for engaging in union or other protected activities; as alleged in Paragraph 37(a) of the complaint; and consequently find no independent violation of Section 8(a)(1).

(aa) *Foreman Robert Hewell (Robert Hewell)*

John Rauza testified that he performed bench work and operated various machines in Department 3 at Hamilton Standard under the supervision of Foreman Robert Hewell; and went out on strike in June 1960 for the duration. Later during the strike on a Friday, Foreman Hewell called me by telephone, and said that he was going to start up the "line" on Monday, and would like for me to come back to operate the machines. Thereupon, I objected to crossing the picket line, and Foreman Hewell said: "You can cross it. You don't have to be afraid of anything. I would like to start up Monday. If you don't, I will have to replace you with another man." So I said "All right, I will see you Monday; but later decided to stay out."

In the foregoing testimony of John Rauza, I find no threat of economic reprisal to employees for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. It follows, therefore, and I find that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

(bb) *Foreman Phalen (John Phalen)*

William P. Reilly testified that he was employed at Hamilton Standard under the supervision of Foreman John Phalen; had been a timekeeper about 2 years; and went out on strike for the duration in June 1960; that during the strike he talked to Foreman John Phalen several times and all statements made to him by his foreman was to the same effect. Phalen said "I am in a crisis"; and told me that

some of the timekeepers had already come back to work, and he couldn't understand why I didn't come back—that I would be liable to lose my job, if I did not come back to work.

The foregoing witness does not even contend that any threats were made to him during the several conversations had with Foreman Phalen. The alleged statements were no more than a plea to help his foreman in the apparent crisis caused in his department by reason of the strike; and any such statement about losing his job if he did not return to work, under the circumstances, merely referred to efforts being made to continue operations to the extent of hiring replacements if possible. I find therein no threat of economical reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. It follows, therefore, and I find that Respondent did not thereby interfere with, restrain or coerce its employees or engage in any independent violation of Section 8(a)(1) of the Act.

(cc) *Personnel Manager Wilhide (Mr. P. Wilhide)*

Herve Desriusseaux further testified that at sometime during the latter days of the strike, a personnel man named Wilhide at Gate 2 of the Pratt & Whitney East Hartford plant called to him on the picket line, and said: "Come on it. It's your last chance."

I find in the foregoing testimony no threat of economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. The complaint simply alleges that "Personnel Manager Wilhide—June 1960 to August 1960." There was no identification of Wilhide beyond referring to him as a personnel man; and it does not appear that he exercised any supervisory authority whatsoever. Evidently he was no more than a non-striking heckler; and any such statement made by such a person cannot be attributed to the Respondent Corporation.

I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

(dd) *Foreman Sanfield—June 1960 to August 1960*¹⁸

Frank J. Don Aroma testified in pertinent substance that he has been a member of Lodge 743 since 1941; that he became a union organizer in 1941, and also served as a union steward for the period 1941-1944; and then enlisted in the Armed Forces of the United States until 1946 when he returned to the employment of Hamilton Standard. In 1947 he was appointed Union Committeeman, and thereafter elected President of Lodge 743 in 1948. He worked for Respondent in several different jobs including that of set-up man until appointed foreman in May 1956. He served as a foreman in Experimental Test Department #23 until laid off in June 1959 by reason of a cut-back in operations. Thereupon, he accepted a job as ordinary employee with assurance of a later promotion back to foreman upon materialization of a new department requiring the services of a foreman to supervise the installation and repair of propellers on aircraft brought in from other manufacturers. Thereupon, he rejoined the Union, and at that time discussed the subject with Assistant Superintendent Sanfield, who inquired whether he realized that it might hurt his chances of getting back into supervision and getting the new job as foreman that they were lining up for him. He was actually performing this proposed new type of work at that time, but had not yet received the anticipated promotion; and about 3 weeks prior to the strike was reclassified to a fuel laboratory mechanic by reason of a seniority conflict with another set-up man. Thereafter, on June 8, 1960, he went out on strike for the duration.

¹⁸ This is exact words used in the allegation shown in paragraph 37(a) of the complaint, without further explanation.

The foregoing testimony of Don Aroma clearly shows that any conversation he had with Assistant Superintendent Sanfield occurred several weeks or probably months prior to the strike and prior to May 21, 1960, which date has been found herein to fix the limitation proscribed by the Proviso in Section 10(b) of the Act forbidding the Board or any agency thereof to issue any complaint based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made; the initial charge herein having been filed and served on November 21, 1960. Furthermore, it is a well-established principle of law that an employer has the right to adopt and publish the policy that an employee must automatically forego his membership in the Union when he becomes a supervisor even to the extent of discharging a supervisor for affiliating with a labor organization in conflict with his duties as a part of management. It follows, therefore, that telling a prospective foreman that rejoining the Union will conflict with his being a supervisor does not interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, and does not constitute a threat of economical reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. I find, therefore, that Respondent did not thereby engage in any independent violation of Section 8(a)(1).

John Francis Lesczynski testified that during the second week of the strike Superintendent Sanfield called him by telephone, and requested that he come back to work, saying there would be less interference now because the mass picketing had stopped and there were fewer pickets on the line—that I would be one of the senior men, and had an awful lot to lose if I stayed out—that I should think it over.

I find in the foregoing testimony no threat of economical reprisal for engaging in union or other protected activities, as alleged in the complaint. It follows, therefore, and I find

that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

(ee) *Foreman Romeo Cartier—June 1960 to August 1960*¹⁷

John Telesmanic further testified that his Foreman Romeo Cartier called him by telephone several times during the strike. In the first call about the third week of the strike, Foreman Cartier told me that a lot of the boys were back at work, and said "Get together with the boys and come on in to work—your job is still open." In the second call about the seventh week of the strike, Foreman Cartier told me that if I was not back to work Friday of that week that I would be replaced by someone else.

In the foregoing testimony of John Telesmanic I find no threat of economical reprisal for engaging in union or other protected activities. It is well established that an employer has the legal right to replace striking employees on a permanent basis, and when that is done the striking employee has no further claim to his former position as an economic striker. It follows, therefore, that fixing a date on which such replacement will be made, thereby affording the striker an opportunity to reclaim his job prior to that date does not interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. I find, therefore, that Respondent did not thereby engage in an independent violation of Section 8(a)(1).

(ff) *Foreman Hill—June 24, 1960 and September 1960*¹⁸
(*Gardner Hill*)

Alex A. Newell further testified that on June 24, 1960, Foreman Gardner Hill called by telephone and asked me

¹⁷ *Ibid.*

¹⁸ *Ibid.*

to come back to work—that they would not hold my job (open) any longer if I didn't come to work. Thereafter in September 1960, I went to see Foreman Hill to inquire as to when I would be called back to work since being put on the preferred hiring list, and he said: "Your job has been taken. You were replaced by somebody else. As far as I know, your goose is cooked."¹⁹

Discrimination, if any, against the above striker (Alex A. Newell) will be determined pursuant to other allegations of the complaint, including any derivative violation of Section 8(a)(1); but the foregoing testimony of Newell contains no threat of economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. Surely it was no threat to tell the striker that there was no job open for him at that time because he had been replaced by somebody else or to express an opinion as to the result thereof. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

Subparagraph 37(b) of the complaint alleges that Respondent did "Interrogate its employees concerning their union affiliations and sympathies."²⁰

Edward Rollands—May 21, 1960

With respect to Edward Rollands, I find in the record no evidence or identification whatsoever to support the allegation made against Respondent in Paragraph 37(b) of the complaint, I find, therefore, that Respondent did not thereby engage in any independent violation of Section 8(a)(1).

¹⁹ Newell was rehired and returned to work in March 1962.

²⁰ The following subheadings show exact terminology used in subparagraph 37(b) of the complaint to describe the individual violations committed.

George Sabisky—June 1, 1960

The evidence relied upon by the General Counsel to support this allegation against George Sabisky is the same as offered to support the allegation of threats contained in Paragraph 37(a), *supra*. Having already found from a preponderance that Respondent did not thereby engage in any independent violation of Section 8(a)(1), I repeat that finding here; and recommend that this duplication of an alleged violation of Section 8(a)(1) be dismissed.

William Dwyer—Early Part of 1961

The evidence relied upon by the General Counsel to support this allegation of interrogation is the same testimony of Earl C. Martin which was discredited by this Trial Examiner in his determination of the allegations against William Dwyer in Paragraph 37(a) of the complaint, *supra*; in which it was found that Respondent did not thereby engage in any independent violation of Section 8(a)(1). My finding is the same here, and I recommend dismissal of this duplication of an alleged violation of Section 8(a)(1) of the Act.

Foreman Norman Millard—June 1960

Alexander H. Sulewski testified in substance that he was employed as a turret lathe operator in Department 121 at Pratt & Whitney under the supervision of Foreman Norman Millard; and on June 8, 1960, went out on strike for the duration. Approximately 1 week prior thereto, Foreman Millard inquired whether I thought we would go on strike. When I replied that "We are," Foreman Millard said: "To me, I guess you are foolish to go out on strike. You have a good job here. If I were you—you may find out you may not have a job if you go out on strike—if I were you I would tell the fellows to turn around and talk them out of it." Then I said: "I can't talk them out of it. After all, it is a union strike."

I find in the foregoing testimony of Sulewski no illegal interrogation of employees concerning their union affiliation and sympathies; as alleged in Paragraph 37(b) of the complaint; and certainly no threat of economic reprisal for engaging in union or other protected activities, as alleged in Paragraph 37(a) of the complaint. I find, therefore, that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1) of the Act.

Foreman John Swiatkewicz—May 1960 to June 1960

Stanley A. Modzeleski testified that he was employed as a leadman in the Material Control Department of Hamilton Standard under the supervision of Foreman Swiatkewicz, and went out on strike for the duration on June 8, 1960; that approximately 3 weeks prior to the strike, Foreman Swiatkewicz asked if I was going on strike, and I said: "I will go with the majority."

It having been found herein, *supra*, that the limiting proviso contained in Section 10(b) of the Act is a bar to the litigation of unfair labor practices occurring prior to May 21, 1960, the burden is on the General Counsel to prove that the alleged statement of Foreman Swiatkewicz is not barred by the State of Limitations, and this he failed to do. I hold, therefore, that the litigation of aforesaid allegation contained in Paragraph 37(b) of the complaint is proscribed by Section 10(b) of the Act. Furthermore, I hold under the circumstances of this case, a casual inquiry as to whether employees are going on strike, unless accompanied by some threat of economic reprisal or other form of interference, restraint or coercion, does not constitute an independent violation of Section 8(a)(1). I find, therefore, that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Foreman William Smith—June 1960

Edwin Chmielewski testified in substance that he was employed as a sheet metal leadman in Department 616 at Pratt & Whitney under the supervision of Foreman William Smith, and went out on strike for the duration on June 8, 1960; that approximately 1 week prior to the strike, Foreman Smith came to him at his place of work in the plant, and said: "Do you have a button on?" I said "Yes," and showed him a "Unity button." Thereupon, Foreman Smith wrote something on a paper tablet, and I inquired: "What's that for?" and he replied: "Oh, they want a count of how many boys are wearing buttons." After leaving me, I observed Foreman Smith checking other employees in the plant.

The Respondent offered no evidence to deny or explain the aforesaid credible testimony of Edwin Chmielewski, and I am constrained to find that such conduct engaged in by Foreman William Smith constituted interrogation and surveillance of its employees concerning their union affiliations and sympathies in violation of Section 8(a)(1) of the Act. I find, therefore, that Respondent thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and engaged in an independent violation of Section 8(a)(1).

Personnel Manager DeMarco—October 1960

Gerald F. O'Connell testified that he was working in the Maintenance Department at Pratt & Whitney, and on June 8, 1960, went out on strike for the duration; that he had been a group leader in charge of the storage cribs for parts, wire, pipes, etc., and about 2 years before the strike had been given a physical examination by the company doctor, required to sign a waiver, and was thereafter restricted to lifting weights not in excess of 35 or 40 pounds. After the strike, he was recalled in October 1960, and went back to work in his old department; whereupon, the supervisor in

charge sent him over to the hospital for a physical examination, after which he went back to work. Shortly thereafter, his general supervisor sent him back to the hospital for a further examination, upon the completion of which he was directed to see a Mr. DeMarco at the Personnel Department; and thereupon the following conversation with Henry P. DeMarco transpired:

"He said to me 'Gerry you are active in the Union.' I says, 'Yes, I was a steward and a committeeman. What does that have to do with it?' He says 'Nothing, I was just curious.' He says, 'The job we had for you, you can't do.' I said, 'I was doing it for the last three years.' He said, 'Well, we will have to look around and find another job for you.'"

Henry P. DeMarco credibly testified that he was assigned as a personnel advisor to the area of the plant engineering group for the primary function of assisting supervisors in their relationship with employees and in some situations to discuss with them the provisions of the collective-bargaining agreement; and if Gerald F. O'Connell was a union steward or committeeman in that area, it is possible that such matters were discussed with him; but that he cannot recall any such contact or discussion with him in October 1960; but denies making any such alleged statements to O'Connell or any other employee.

From my observation of these two witnesses (O'Connell and DeMarco), I am constrained to credit the denial of this personnel supervisor that he made such statements in the garbled form alleged by the witness for General Counsel. It is not positively denied that some discussion concerning the recall of O'Connell occurred, but I am convinced from all the testimony and all surrounding circumstances that such conversation, if any, is more pertinent to the discrimination section of this case including any derivative violation therefrom than to interrogation of employees as an independent violation of Section 8(a)(1). I find, therefore,

that a preponderance of the evidence does not show that Respondent thereby engaged in any independent violation of Section 8(a)(1) as alleged in Paragraph 37(b) of the complaint.

Foreman Ray Morin—April 1960 to June 1960

Clifford Stanley Lyon testified that he was employed as a fusion welder in Department 963 at Pratt & Whitney, and on June 8, 1960, went out on strike for the duration; that he was appointed union steward in 1956, committee man in 1959, and during the strike served the Union as trustee, performed picket duty, and was in charge of transportation. After the strike in August 1960, he registered for reinstatement pursuant to the Strike Settlement Agreements; that prior to the strike in March 1960, Foreman Morin engaged in conversation with him at his welding booth saying that my union activities were too strong, and that I had better cut it out or something would happen. Thereafter, after four weeks prior to the strike, Foreman Morin engaged in a second conversation with him at his welding booth, inquired whether we were going out on strike, and said: "Let me tell you something, if you go out on strike, you'll never come back in this plant."

Foreman Raymond L. Morin credibly testified that prior to February 15, 1960, Clifford Lyon worked as a welder under his supervision on the second shift in Department #963 at Pratt & Whitney; but on that date was transferred to the first shift under the supervision of another foreman; and since his transfer, has not had any conversations whatsoever with him. Lyon was a union steward, and shortly prior to his transfer in February 1960, he (Foreman Morin) on several occasions observed employees crowded around Lyon in the small welding booth (9 x 9 feet) where he worked, thereby causing a dangerous situation; and thereupon, he instructed Lyon that he must not have discussions in the plant about matters not pertaining to his job, and might have mentioned the Union, because he sus-

pected that they were talking about union affairs; but never at any time made any statement similar to those now attributed to him by Lyon.

From my observation of these two witnesses (Lyon and Morin) and from all the circumstances of this case, I credit the testimony of Raymond L. Morin and discredit that of Clifford Stanley Lyon. There is nothing in the record to corroborate Lyon, but Foreman Morin is corroborated by a "change of status slip" introduced in evidence as Respondent's Exhibit No. 123 showing the transfer of Lyon to the first shift on February 15, 1960. From a preponderance of the evidence, I find that Foreman Ray Morin (Raymond L. Morin) did not make the statements attributed to him by Clifford Stanley Lyon, and did not interrogate employees concerning their union affiliations and sympathies, as alleged in Paragraph 37(b) of the complaint. Furthermore, it is apparent even from the testimony of Lyon that the alleged statements testified to by him occurred more than six months prior to the filing of the initial charge herein, and any litigation as to them is barred by the limiting proviso contained in Section 10(b) of the Act.

Thereupon, it follows and I find that Respondent did not thereby interfere with, restrain or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

Subparagraph 37(c) of the complaint alleges that Respondent did "Make offers of benefit conditioned upon ceasing to engage in union or other protected concerted activity.

*Foreman Robert Sweeney
(at various times in June-August 1960)*

Rene G. Hebert credibly testified in substance that he was employed as a machine operator (gear shover) in Department #3 at Hamilton Standard under the supervision of Foreman Sweeney, and on June 8, 1960, went on strike for

the duration; and at the end of the strike in August 1960, registered for reinstatement pursuant to the Strike Settlement Agreements. At some time during the strike, Foreman Sweeney called by telephone and offered me a raise of twenty cents per hour if I would cross the picket line and come back to work.

It is well established that it is a violation of Section 8(a)(1) when an employer promises a reward or benefit to employees on condition that they cease and desist from participation in concerted activities for the purpose of collective bargaining or other mutual aid or protection. In this case employees were engaged in an economic strike and otherwise exercising the rights guaranteed in Section 7 of the Act. From the undisputed testimony of Rene G. Hebert (employee on strike), I find that Foreman Robert Sweeney (admittedly a supervisor of the Respondent) proposed to give him an increase in pay of twenty cents per hour if he would come back to work, thereby crossing the picket line whereon his fellow strikers were exercising the right to engage in such activities. I find, therefore, that Respondent thereby interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby engaged in an independent violation of Section 8(a)(1).

Charles Lindsay—June 1960 to August 1960

Robert J. Bellon credibly testified that he was employed as labor Grade 9 in Department 311 at Hamilton Standard under the supervision of Foreman Charles Lindsay, and on June 8, 1960, went out on strike for the duration; that during the second or third week of the strike, Foreman Lindsay called him by telephone and proposed to give him the job of leadman if he would return to work; and he refused the offer because it would replace his good friend and fellow striker Joe Burke, who had held that job for 25 years.

Therefore, I find from the undisputed testimony of Robert J. Bellon that Respondent thereby interfered with, re-

strained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act and thereby engaged in an independent violation of Section 8(a)(1).

Roger E. Vallerand credibly testified that he was employed as a mechanic and electric assembler in Department 311 at Hamilton Standard under the supervision of Foreman Charles Lindsay, and on June 8, 1960, went out on strike for the duration; that about the third week of the strike, Foreman Lindsay called him by telephone, proposed that he come back to work—that he would get his old job back plus a reasonable hike in pay at that time and have better chances for advancement; but he would not be responsible for what happened later.

I find, therefore, from the undisputed testimony of Roger E. Vallerand, that Respondent thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in an independent violation of Section 8(a)(1).

Foreman Zaresky—June 1960 to August 1960

John Francis Lasczynski (having also testified with respect to a telephone call from Superintendent Sanfield, *supra*) further testified that his foreman Steve Bareski called him by telephone, and requested him to come in to work—that he wanted someone to start a movement back to work—that he could work extra overtime hours on the second shift on which he would be working.

General Foreman Stephen Zaresky credibly testified that he was instructed by his supervisor to call employees by telephone and tell them that their jobs were still available, and to ascertain whether they would return to work, but not to promise them anything; that he called John F. Lasczynski from his office during the strike, and said: "How do you feel, John? The job is still open. I'd be glad to have you come back to work." And that is all. I *did not* tell Lasczynski that I wanted someone to start a movement

back to work; and did not say that if he would come in, he could work extra overtime hours. I *did not* make any such statements to Lasczynski or to anyone else, and did not indicate in any way that they would be rewarded for returning to work.

From my observation of the witnesses (Lasczynski and Zoresky) and from all the circumstances of the case, I credit the Zaresky version of his conversation, and discredit the Lasczynski version insofar as it is contrary thereto. I cannot find from a preponderance of the evidence that General Foreman Stephen Zaresky made any offer of benefit to employees conditioned upon ceasing to engage in union or other protected concerted activity, as alleged in the complaint.

It follows, therefore, and I find that Respondent did not thereby interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

Subparagraph 37(d) of the complaint alleges that Respondent did "Require all persons who engaged in the strike . . . and who were not reinstated to any position prior to December 31, 1960, in accordance with Paragraphs 4(a) and 4(b) of the Strike Settlement Agreements . . . to file new employment applications as a condition of employment on and after January 1, 1961.

I find in the Strike Settlement Agreements herein no restriction whatsoever on the right of economic strikers to be recalled to their prestrike positions if available at the end of the strike. These agreements simply provided for an orderly implementation of this right for a period of approximately five months following the strike and ending on December 31, 1960; and did not affect any continuing right to reinstatement after that date. Consequently, I find that the invitation of Respondent to approximately 1,701 registered strikers to file new applications for employment on

or after January 1, 1961, resulted in nothing more than a new registration or revision of the preferred hiring list of strikers still available and claiming the right of reinstatement to their prestrike position of employment. Having already found that Respondent discriminated against strikers not recalled to work by January 1, 1961, by hiring new employees into jobs formerly held by them, it would be a duplication of charges, allegations and remedies to hold that Respondent also engaged in an independent violation of Section 8(a)(1) by requiring these strikers to file new employment applications as a condition of employment on and after January 1, 1961. I shall hold, therefore, that such invitation or requirement herein constitutes a derivative violation of my previous finding of discrimination in violation of Section 8(a)(3); and recommend that this duplicating allegation contained in Paragraph 37(d) of the complaint be dismissed.

Subparagraph 37(e) of the complaint alleges that Respondent did "Require all persons who engaged in the strike * * * and who were reinstated to a position in accordance with Paragraph 4(b) of the Strike Settlement Agreements * * * to sign waivers of their rights to be reinstated to their prestrike positions.

The record fails to show that any of the registered strikers signed a document to waive their right to recall under the terms of the Strike Settlement Agreement of their continuing right thereafter to be recalled during the period January-April 1961, inclusive. It is true that on occasions when strikers were offered comparable jobs under the terms of those Agreements, but declined to accept, and expressed the desire to wait for an opening for them in their prestrike positions, the Respondent requested such strikers to sign an acknowledgement in writing that such offer had been made by Respondent. I find no discrimination therein by the Respondent, and the right of reinstatement to their prestrike positions was not restricted thereby,

and did not constitute the signing of a waiver as alleged in the complaint. It is, therefore recommended that Subparagraph 37(e) of the complaint be dismissed.

Subparagraph 37(f) of the complaint alleges that Respondent did "Require all strikers who were returned to some position subsequent to the strike * * * up to and including December 31, 1960, to undergo physical examinations.

The record herein fails to show that any of the registered strikers herein have been disqualified for reinstatement to their prestrike status by requiring them to take a physical examination before returning to work. If such is the case, the striker involved has not lost his right of reinstatement to his prestrike status, and will be covered by the discrimination section herein and the remedy provided therein. This ruling will not apply to any striker recalled to a comparable job, and thereupon found physically disqualified for the work required therein; otherwise the Respondent might be held legally responsible for requiring an employee to perform work for which he was physically unfit. Such a ruling would not apply if it be found upon recall to work that the employee's physical condition had changed to the extent of rendering him unfit for further performance in his prestrike position. I find, therefore, that Subparagraph 37(f) is a duplication of the charges and allegations of discrimination herein determined and will be given consideration as a derivative violation of 8(a)(3) rather than an independent violation of 8(a)(1). I recommend, therefore, that Subparagraph 37(f) of the complaint be dismissed.

Subparagraph 37(g) of the complaint alleges that Respondent did "On and after January 1, 1961, terminate the seniority rights and other benefits of employment previously enjoyed for all persons who engaged in the strike * * * and who were re-employed by Respondent on and after January 1, 1961.

From the entire record in this case it appears and is not denied that Respondent interpreted the Strike Settlement Agreements to mean that the right of registered strikers to reinstatement in their prestrike status ended on December 31, 1960, and that all strikers re-hired after that date would come back to work as new employees without seniority or other accumulated benefits and privileges to which they were entitled by reason of prestrike employment. Having found that the Strike Settlement Agreements did not restrict the reinstatement rights of the strikers, it follows, and I find that the material denial or curtailment of such rights by the Respondent with respect to those strikers re-hired during the period January-April 1961 was and is a discrimination against its employees within the meaning of Section 8(a)(3) for which a remedy will be provided herein, including a derivative violation rather than an independent violation of Section 8(a)(1).

Subparagraph 37(h) of the complaint alleges that Respondent did "Treat female strikers in a disparate manner at its plants of Hamilton Standard and Pratt & Whitney.

The National Labor Relations Act does not proscribe or prevent discrimination against employees by reason of sex; but does make it an unfair labor practice (regardless of sex) to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. It must be noted, however, that any female strikers herein are entitled to and will receive the same consideration provided for all strikers in the application of the remedy provided herein. I recommend, therefore, that subparagraph 37(h) of the complaint be dismissed.

Subparagraphs 37(i) and 37(j) were added to the complaint on August 30, 1963, after the hearing herein had been in session for several months, and relate to the final efforts of attorneys representing the Union and the Respondent to settle the entire controversy between the par-

ties without further litigation. Since both paragraphs pertain to the same subject matter and allege the same independent violation of Section 8(a)(1), and to simplify procedure herein, they are hereby consolidated and considered together. It is alleged (37(i)) that Respondent did "On or about January 4, 1963, threaten the Union that it would bring a civil suit against it, unless the Union would withdraw the charges in Case No. 1-CA-3355 et al., or have those charged dropped from the consideration of the Board"; and did (37(j)) "On or about May 14, 1963, institute separate civil suits against Lodge #1746 and Lodge #743 in the Superior Court for the State of Connecticut pursuant to its threat described above in Paragraph 37(i)."

These allegations are based upon testimony of Plato E. Papps, General Counsel of IAM, AFL-CIO, to the effect that during negotiations to settle the controversy, representatives of the Respondent said that Respondent was going to sue the Union for damages to property resulting from violence and malicious mischief on the picket lines. The Respondent had previously filed unfair labor practice charges against the Union, but the General Counsel had refused to issue a complaint. The Strike Settlement Agreements and a new collective bargaining agreement went into effect on or about August 8-11, 1960, and the arbitration hearings as to the 50 strikers had been started before the Baldwin Panel on September 20, 1960; when about that time Papps, representing the Union, complained to Burke and Wells that the Respondent was not complying with the terms of the Strike Settlement Agreements, and threatened to file 3,000 unfair labor practice charges against the Company, whereupon Vice President Burke retorted "I will sue you." Shortly thereafter on November 21, 1960, the Union filed the initial charge herein, and continued to file numerous amended charges over a long period of time even after the hearing began on May 16, 1963. The Union concurrently therewith filed a suit against Respondent in the U. S. District Court of Connecticut, alleging breach of

contract, and invoked therein ancillary disclosure proceedings to develop information for use in both that lawsuit and with respect to the unfair labor practice charges filed with the National Labor Relations Board. Thereafter in January 1962, representatives of the Union and the Respondent held a meeting at the Waldorf Astoria Hotel in New York City for the purpose of negotiating a settlement of the entire controversy and withdrawing all charges and the lawsuit for breach of contract, and at that meeting Burke said that the Company was going to sue the Union for damages unless the entire controversy could be settled by the withdrawal of all suits and charges; and at that time the Respondent proposed to open its records for the Union to determine as to which employees, if any, the Strike Settlement Agreements had not been complied with. General Counsel Papps thereupon agreed to consider the offers made by Respondent, and jointly with Respondent's Attorney Joseph C. Wells called the General Counsel of the Board in Washington, D. C., requesting a postponement of prehearing subpoena proceedings and a meeting with him to discuss a settlement agreement. Thereafter, on or about December 11-12, 1961, in a telephone conversation, Vice President Burke urged Papps to get moving on these cases—that there was no merit in the Union lawsuit—or else the Respondent was going to file suit against the Union. Thereupon, a meeting of the parties was arranged for and held at the office headquarters of General Counsel Plato E. Papps, IAM, AFL-CIO, in Washington, D. C. on January 4, 1963, at which the Union was represented by its General Counsel Plato E. Papps, International President Hayes, Vice Presidents McGlon and Mat DeMore; and the Respondent was represented by its Attorney Joseph C. Wells, Vice President Burke, and Personnel Director Mooney. Respondent contended there were only about 300 of the strikers not completely restored to work, and again offered to open its records for the Union to identify them; whereupon, Papps told Vice President

Burke there was no point in his going to the company plants to look at personnel records because the U. S. District Court was going to require Respondent to bring them to the Union. Then Burke said that the Company was prepared to file three suits for damages against the Union for the total sum of \$15,000,000. Thereupon, Papps said "We will pay \$65,000 or \$68,000," but his offer was ignored. After that meeting, there were no further negotiations for a settlement; and, thereafter, on May 14, 1963, Respondent filed Civil Suits Nos. 13384 and 13385 in the Superior Court of Hartford County, State of Connecticut, in which the Court on November 26, 1968, by MEMORANDUM OF DECISION ON HEARING IN DAMAGE awarded damages to Pratt & Whitney in the sum of \$1,369,725.25 with interest from August 12, 1960; and to Hamilton Standard the sum of \$88,662 with interest from August 12, 1960; plus expenses of litigation in the sum of \$296,000; and judgment was entered in accordance therewith.

The right to sue and be sued is a fundamental right of citizenship in the United States of America and in every State thereof; and only a sovereign government itself can claim exemption from suit. I find nothing in Section 8(a)(1) or anywhere else in the Act that makes it a violation to sue or threaten to sue a labor organization. Section 8(a)(1) provides that it shall be an unfair practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act"; but a labor organization is not included within the term "employee" defined in Section 2(3) of the Act. I find, therefore, that Subparagraphs 37(i) and 37(j) do not allege a violation cognizable under Section 8(a)(1); and further find from all the evidence and circumstances of this case that the Respondent did not thereby interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act or engage in any independent violation of Section 8(a)(1).

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in Section III, *supra*, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent, in violation of Section 8(a)(1) and (3) of the Act, during the period from August 11, 1960, through December 31, 1960, inclusive, discriminated against certain economic strikers herein registered pursuant to the Strike Settlement Agreements on the preferred hiring list for reinstatement according to seniority to their prestrike positions, by filling such positions by transfers and promotions within the operating organization, I shall order that Respondent from its records identify and offer to each of such employees immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority, vacation, or other rights and privileges previously enjoyed, discharging if necessary the present occupant of such position; and make him whole for any loss of earnings he may have suffered by reason of its untimely failure or refusal to recall him to work, by payment to him of a sum of money equal to that which he would normally have earned as wages from the date on which such position was filled by transfer or promotion within the operating organization to the date of Respondent's offer to him of proper reinstatement, less

his net earnings during such period, as backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 and *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

Having also found that Respondent in violation of Section 8(a)(1) and (3) of the Act, during the period January-April 1961, inclusive, discriminated against economic strikers by failing and refusing to reinstate them according to seniority to their prestrike positions, by terminating their employment, by treating them as new applicants for employment with resulting loss of seniority and other rights and privileges previously enjoyed, and by hiring new employees to fill jobs developed or activated in the prestrike job codes, departments, and shifts for which they had registered and applied at the end of the strike; I shall order that Respondent from its records identify and offer to each of such employees immediate and full reinstatement, according to seniority, to his prestrike or substantially equivalent position in jobs developed or activated during the period January-April 1961, inclusive, without prejudice to his seniority, vacation, and other rights and privileges previously enjoyed, discharging if necessary the present occupant of such position; and make him whole for any loss of earnings he may have suffered by reason of the discrimination by restoring to him all seniority and other rights and privileges previously enjoyed and by paying to him a sum of money equal to that which he normally would have earned as wages from the date on which such position was filled by a new employee or other person to the date of Respondent's offer to him of proper reinstatement, less his net earnings during such period, as backpay and interest in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

In the event that Respondent and counsel for the General Counsel cannot agree to or determine the identity of afore-

said discriminatees, it is recommended that the General Counsel request a reopening of the hearing and the designation of another Trial Examiner to hear evidence limited to identification of the employees discriminated against and the jobs to which reinstatement has been ordered herein.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. United Aircraft Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Association of Machinists, AFL-CIO, Lodge #1746, Lodge #743, and Lodge #700 (herein collectively called the Union) are labor organizations within the meaning of Section 2(5) of the Act.

3. By virtue of Section 9(a) of the Act, Lodge #1746 at the Pratt & Whitney Division, East Hartford and Manchester, Connecticut; Lodge #743 at the Hamilton Standard Division, Broad Brook and Windsor Locks, Connecticut; and Lodge #700 at the Canel plant, respectively, has been at all times material herein the exclusive representative of all production and maintenance employees in the appropriate unit for the purpose of collective bargaining.

4. During the period from August 11, 1960 through December 31, 1960, inclusive, by transferring and promoting other employees within its operating organization to available prestrike positions of economic strikers registered for reinstatement pursuant to the Strike Settlement Agreements, Respondent has discriminated in regard to hire or tenure of employment and other terms or conditions of employment to encourage or discourage membership in a labor organization, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. During the period January-April, 1961, inclusive, by terminating the employment of economic strikers, unilaterally changing their rights to reinstatement, seniority and other terms and conditions of employment by treating them as new applicants for employment and by hiring new employees to fill their prestrike positions, Respondent has discriminated in regard to hire or tenure of employment and other terms and conditions of employment to encourage or discourage membership in a labor organization, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

6. By the foregoing conduct and by other independent acts of certain of its supervisors, Respondent interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act; consisting (1) threats of economic reprisal for engaging in union or other protected activities by Foreman Leonard Welles; (2) interrogation creating the impression of surveillance of their union affiliations and sympathies by Foreman William Smith; (3) offers of benefit conditioned upon ceasing to engage in union or other protected activity by Foreman Robert Sweeney and Foreman Charles Lindsay.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent did not engage in any unfair labor practices alleged in the complaint which are not specifically found herein.

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

The Respondent, United Aircraft Corporation, its divisions, officers, agents, supervisors, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with economic reprisal for engaging in union or other protected activities; interrogating its employees to create the impression of surveillance of their union affiliations and sympathies; and making promises of benefit to its employees conditioned upon ceasing to engage in union or other protected concerted activity.

(b) Discouraging membership in Lodge #1746, Lodge #743, and Lodge #700, International Association of Machinists, AFL-CIO, or any other labor organization, by failing or refusing to reinstate economic strikers to their former prestrike positions; by transferring or promoting other employees to such positions while economic strikers are available to fill them; by terminating the employment of economic strikers and treating them as new applicants for employment; by unilaterally changing their rights to reinstatement, seniority or other terms and conditions of employment; or by hiring new employees to fill such positions so long as the economic strikers have not abandoned employment with the Respondent for other substantially and equivalent employment.

(c) In any other manner interfering with, restraining or coercing its employees or in any manner infringing upon the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Identify and offer, according to seniority, to registered strikers on the preferred hiring list established by the Strike Settlement Agreements, all prestrike positions

filled prior to January 1, 1961, by transfers and promotions within the operating organization of Respondent, discharging if necessary the present occupants of such positions, unless such strikers were reinstated prior to that date to their prestrike or substantially equivalent position without prejudice to their seniority or vacation or other rights and privileges; and make each of them whole for any loss of earnings he may have suffered by reason of the discrimination found herein, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Identify and offer, according to seniority, to the economic strikers not recalled during the period January-April 1961, inclusive, immediate and full reinstatement to their prestrike or substantially equivalent positions in jobs developed or activated in their respective job codes, departments and shifts, during the period from January 1, 1961 thru April 30, 1961, inclusive, without prejudice to their seniority, vacation or other rights and privileges, discharging if necessary the present occupants of such positions; and make each of them whole for any loss of earnings suffered by reason of the discrimination found herein, in the manner set forth in the Section of this Decision entitled "The Remedy."

(c) Preserve and make available to the Board, upon request, for examination and reproduction, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to compute and determine the amount due as backpay herein.

(d) Notify all employees herein involved, if presently serving in the Armed Forces of the United States, of their right to make application for reinstatement as herein provided, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(e) Post at its plants of the Pratt & Whitney Division at East Hartford and Manchester, Connecticut and plants

of the Hamilton Standard Division at Broad Brook and Windsor Locks, Connecticut; and at its Canel plant, copies of the notice attached hereto and marked "Appendix."²¹ Copies of said notice to be furnished by the Regional Director for the First Region (Boston, Massachusetts) shall, after being duly signed by an authorized representative of the Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director in writing within 20 days from the date of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.²²

I further recommend that the complaint be dismissed insofar as it alleges that Respondent violated the Act in any manner not herein specifically found.

Dated at Washington, D. C. July 25, 1969.

/s/ LEE J. BEST
Lee J. Best
Trial Examiner

²¹ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

²² In the even that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NATIONAL LABOR RELATIONS ACT

(As Amended)

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interrogate our employees concerning their organizational activities; engage in surveillance of such activities; threaten them with economic reprisal for engaging in union or other protected activities; offer them benefits conditioned upon ceasing to engage in union or other protected concerted activity; or in any other manner infringe upon, interfere with, restrain or coerce our employees in the exercise of their right to self-organization as guaranteed in Section 7 of the Act.

WE WILL NOT discourage membership in LODGE #1746, LODGE #743 and LODGE #700, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization, by failing or refusing to reinstate economic strikers in the prestrike positions to which they are entitled, by transferring or promoting other employees to such positions, or by hiring new employees to fill such positions, so long as such strikers have not abandoned their employment with the Respondent for other substantial and equivalent employment; or by terminating their employment, treating them as new applicants for employment; or unilaterally changing their rights of reinstatement, seniority, or other terms and conditions of employment.

WE WILL offer to all registered strikers on the preferred hiring list that were not recalled to work pursuant to

the Strike Settlement Agreements herein, immediate reinstatement to their prestrike positions in jobs filled by the transfer and promotion of other employees prior to January 1, 1961; and to jobs developed and activated in their former job codes, departments, and shifts during the period January-April 1961, inclusive, in which new employees were hired; and to those strikers hired as new employees, we will restore all rights of seniority and other rights and privileges previously enjoyed by them; and we will make each of them whole for any loss of pay and other emoluments suffered by reason of our discrimination against them.

WE WILL notify all of the above employees presently serving in the Armed Forces of the United States of their right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

All of our employees are free to become or remain, or to refrain from becoming or remaining members of aforesaid union or any other labor organization.

UNITED AIRCRAFT CORPORATION
(Employer)

Dated By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge & New Sudbury Sts., Boston, Massachusetts 02203 (Tel. No. 223-3353, Area Code 617).

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of December, one thousand nine hundred and seventy-five.

Docket No. 72-1935

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS and AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of December, one thousand nine hundred and seventy-five.

Present:

HON. TOM C. CLARK, Associate Justice,

HON. LEONARD P. MOORE,

HON. WILLIAM H. TIMBERS, Circuit Judges.

Docket No. 72-1935

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS and AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

A petition for a rehearing having been filed herein by counsel for the Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

/s/ VINCENT A. CARLIN
Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. A-791

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20, 1976.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 11th day of March, 1976.

Supreme Court, U. S.
FILED

JUL 21 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 75-1729

LODGES 1746 AND 743, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petitions for Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF OF UNITED AIRCRAFT CORPORATION
IN OPPOSITION TO CERTIORARI**

JOSEPH C. WELLS
WILLIAM H. WILLCOX
REED SMITH SHAW & McCLAY
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 75-1729

LODGES 1746 AND 743, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petitions for Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF OF UNITED AIRCRAFT CORPORATION
IN OPPOSITION TO CERTIORARI**

OPINIONS BELOW

These are companion § 301 and NLRB cases. All the opinions are reprinted in the separate appendix to the petitions, cited here and in the petitions as "—a." The consolidated opinion of the Court of Appeals for

the Second Circuit in both cases (— F.2d —, 90 LRRM 2272) is in the separate appendix at 2a-82a. (Petitions for rehearing and suggestions for rehearing *en banc* were denied in both cases by the Court of Appeals, 206a-207a, 483a-484a). In the § 301 case, the opinion (299 F. Supp. 877) and judgment of the District Court (Clarie, J.) are at 83a-205a. In the NLRB case, the opinion of the Board (192 NLRB 382) is at 209a-238a. The opinion of the Trial Examiner is at 248a-482a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions.

QUESTIONS PRESENTED

I. Where, in the Union's § 301 suit attacking the Company's administration of the 1960 Strike Settlement Agreements, the Court of Appeals upheld all the District Court's crucial findings of fact that the Company properly and in good faith carried out the Agreements, is the § 301 case appropriate for review by this Court?

II. Where the Court of Appeals, in the exercise of its discretionary authority, and in accord with well-defined standards, declined to apply retroactively to 1960 strike settlement events a 1967/68 change in well-established law, is the NLRB case appropriate for review by this Court?

STATUTE AND RULE INVOLVED

The statute involved in both cases (Labor Management Relations Act of 1947) is adequately set forth in the petition in No. 75-1729. However, the petitions do not set forth, or mention, Rule 52(a), Fed. R. Civ.

Proc., which is also involved, and which states, in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

COUNTERSTATEMENT OF THE CASE

Both these companion § 301 and NLRB cases center around Strike Settlement Agreements negotiated and executed in 1960 by the petitioning Unions and the respondent Company to settle a strike which occurred in that year. The District Court, the NLRB, and the Court of Appeals found and held that in all major respects the Company reinstated strikers in accordance with the Agreements and the National Labor Relations Act.

The complex facts about the Agreements and their administration, developed at extremely lengthy hearings in both cases, are set out and analyzed in detail in the lengthy opinions of the two courts, the NLRB, and the NLRB Trial Examiner.¹

Petitioners Lodges 743 and 1746, IAM, (the Union) were and are the collective bargaining representatives of certain of the Company's plants in Connecticut. Lodge 743 represents employees at the Windsor Locks and Broad Brook plants of the Hamilton Standard

¹ The hearing in the District Court took 52 days between February 21 and July 7, 1967. See 5a. The transcript consists of more than 10,000 pages. The hearing before the Trial Examiner took place at "numerous intermittent sessions [256 days] beginning on May 16, 1963, and closing on June 11, 1968." 251a. The transcript consists of more than 30,000 pages. The joint appendix in the § 301 case in the Court of Appeals (§ 301 J.A.) consists of 6 volumes and 2,639 pages. The joint appendix in the NLRB case in the Court of Appeals consists of 5 volumes and 1,974 pages.

Division of the Company. Lodge 1746 represents employees at the East Hartford and Manchester plants of the Pratt & Whitney Aircraft Division of the Company. 87a. The Union struck these plants for a new contract in early June, 1960. The strike lasted nine weeks. It was accompanied by violence. 3a-4a, 88a, 225a.

The Company commenced in mid-July to hire permanent replacements for strikers, and this program continued until the strike ended. 14a-15a, 47a-48a, 90a-91a, 107a-117a.

After intensive negotiations between the parties, the strike was settled August 11, 1960, by three "inter-related" (100a) agreements signed by the parties. These were: (1) a new collective bargaining contract, (2) two written Strike Settlement Agreements (one for Pratt & Whitney, the other for Hamilton Standard) on standards and procedures to govern the recall of strikers to jobs at the four plants, and (3) written agreements to arbitrate the cases of 50 strikers accused of serious strike misconduct. 4a-9a, 90a-101a.

The full text of the Strike Settlement Agreements is in the margin at 8a-9a. The Court of Appeals described the Agreements as follows:

The Strike Settlement Agreements called for strikers desiring to return to work to express their intention by registering. Under the terms of the Agreements registration would take place at Hamilton Standard on August 9 and 10, 1960. Strikers not registering would be treated as having quit and not desiring to return to work. Those strikers who did register would then be recalled in accordance with the provisions in the Agreements. . . . The Agreements provided for recall to occur in three phases, corresponding to paragraphs 4(a),

4(b) and 4(c). Under Phase 1, strikers would be returned to their prestrike jobs (i.e. same job code, department and shift) if they were available at the end of the strike. If a striker's prestrike job was not available, under Phase 2 he would then be recalled to certain other jobs then available. Finally, under Phase 3 registered strikers not recalled up to that point would be put on a preferred hiring list and placed in jobs which developed before December 31, 1960, the expiration date of the Agreements, before new employees were hired. The order of recall under phases 2 and 3 was to be governed by the relative seniority of the strikers as provided in the collective bargaining agreements recently ratified by the Union membership as part of the strike settlement. 7a-9a.

6,536 strikers registered for reinstatement pursuant to the Agreements. The great majority of these strikers were reinstated by the time the Strike Settlement Agreements and the preferred hiring lists established by them expired on December 31. Only 1,562 registered strikers, out of the 6,536 strikers who originally registered, failed to receive offers of reinstatement under the Agreements before they expired. 9a-10a, 126a-130a. (723 of the 1,562 were at Pratt & Whitney, and 839 at Hamilton Standard.) Strikers who were not recalled during the 4½ month term of the Agreements were not recalled principally because of production imbalances caused by the strike, and reduced employee complements attendant thereto, and/or because they were not eligible for recall under the terms of the Agreements. In this connection, the Court of Appeals noted (11a-12a):

"It is important to recognize that the aggregate figures set out above [9a-10a] provide a broad and

somewhat oversimplified picture of the recall process. The plants involved were not simple units in which all jobs were completely interchangeable. For administrative purposes, plants were divided into separate seniority groups known as 'seniority areas,' and an employee's seniority (length of continuous service with the company) operated only within his seniority area. At Pratt & Whitney types of job skills were classified into 'occupational groups.' Hamilton Standard collective bargaining contracts did not utilize the term 'occupational group' but substituted the concept of 'demonstrated ability' (previous experience in a job that had shown his ability in it). The recall Agreements incorporated this organizational structure, and limited [footnote, 11a-12a, omitted] the recall rights of strikers to available jobs and jobs which developed 'in their occupational groups and seniority areas' (at Pratt & Whitney) and to jobs in which they had 'demonstrated ability' (at Hamilton Standard). Thus, the mere existence of a job vacancy at one of the plants did not automatically mean that a striker had a right to fill the job. If, for example, the vacancy occurred in a seniority area and occupational group for which no strikers were awaiting recall, the Company was entitled under the terms of the Agreements to hire new employees, and in fact this did occur."

Of the 723 employees not reinstated at Pratt & Whitney, 605 responded to letters inviting them to apply for re-employment, and 277 of them were hired as new employees in the first four months of 1961. In addition, 1,562 other employees out of more than 17,000 non-striker applicants were hired at Pratt & Whitney during this time. At Hamilton Standard, 585 of the 839 applied for re-employment, of whom 177 were hired in the first four months of 1961. During this

same period, Hamilton hired only 382 additional new employees from among several thousand applicants. 7a-11a, 124a-130a.²

The Union, dissatisfied with the Company's reinstatement actions, attacked them from two directions—in a § 301 suit in U. S. District Court and in an NLRB proceeding.

In the § 301 case, by way of introduction to its rulings, the District Court said (112a):

The plaintiff-unions have launched a scatter-gun type of attack on the defendant's claimed violations of the Strike Settlement Agreements; they

² As the District Court and the Court of Appeals noted, and the statistics show, much higher percentages of striker applicants than of non-striker applicants were hired during this period. 57a-58a; 128a-130a. Moreover, the record shows, and the courts below noted, the business reasons which led to the 1961 hirings. 22a-25a, 130a-149a.

The great majority of the 1961 Hamilton hires were in the fuel control section of the Windsor Locks plant where all but 149 of the registered strikers had returned to work in 1960. In this section during the first four months of 1961, 89 strikers and 232 non-strikers were hired. § 301 J.A. 2549-2551. Furthermore, large numbers of the new employees were hired in departments where the Company had been hiring new employees even during the time the preferred hiring list was in existence. Thus Pratt & Whitney hired 170 new employees from August 10 through December 31, 1960, at its East Hartford plant in Departments 35, 36, 37, 42, 50, 82, 96, 97, 122, 254, 315, 325, 343, 344, 415, 419, 421, 516, 517, 518, 603, 616, 812, 824, 952, 954, 955, 963, 978, 1222, and 1225. In those same departments during the first four months of 1961, Pratt & Whitney hired a total of 755 persons other than strikers. § 301 J.A. 2463-2500. Further, of the remaining 838 non-strikers hired in the first four months of 1961, many were hired in departments where all strikers had returned to work or resigned in 1960. Thus, all strikers had returned or resigned in 1960 in Departments 252, 253, 317, 322, 346, 424, 436, 615, 619, 622, 661, 979, and 1226, and Pratt & Whitney hired 199 non-strikers in these departments during the first four months of 1961. § 301 J.A. 2473-2480, 2483-2486, 2493-2494, 2499-2500.

claim that practically everything the defendant did in administering the Settlement Agreements was unlawful and carried out with evil motives. Where the settlement contracts afford the plaintiffs' membership greater rights than the national labor law, they tenaciously stress the terms of the settlement contract; but where the inverse position would seem to be more advantageous, they minimize the applicability of the contract terms and seek to apply principles and policies embodied in established precedents under the body of federal labor law.

After trial, the District Court "issued a lengthy decision . . . largely in favor of the defendant, although it did find that the Company breached the agreements in some limited respects." 5a. The Court of Appeals meticulously reviewed the record and, with minor exceptions, affirmed the District Court. In the course of its opinion, the Court of Appeals commented (13a):

"In this case, perusal of the voluminous record coupled with a glance at the lengthy opinion of the district court reveals the diligence of the district judge and the detailed nature of his findings."

The two courts rejected the Union's assertion that the Company deliberately and in bad faith depressed the complements of needed workers during the 4½ months that strikers remained on the preferred hiring list, and that it did so to avoid recalling strikers. They found that staffing did not return to pre-strike levels principally because of production imbalances caused by the strike. 10a-11a, 13a-14a, 17a-25a, 32a-33a, 119a-149a.

The two courts rejected the Union's contentions that there was an explicit or implicit agreement or commitment by the Company to restore employee com-

plements to their pre-strike levels by the termination date of the Strike Settlement Agreements, or that the Company misled the Union about the Agreements or their potential effect on reinstatement opportunities of strikers. 14a-20a, 90a-92a, 115a-117a, 119a-149a, 130a-131a, 140a-141a, 171a-176a.

The two courts found that the Agreements were carried out by the Company in good faith. 13a-25a, 141a, 148a, 176a-189a.

The two courts found that the hiring of new employees and of strikers as new employees, that occurred after the expiration of the Agreements and the preferred hiring list on December 31, neither violated the Agreements—indeed, the District Court noted that the Union made no claim that the strikers had rights under the Agreements after December 31, 123a-124a—nor demonstrated any purpose on the Company's part to keep the employee complements depressed until after December 31. 21a-25a, 123a-149a.

The District Court also found that in recalling and placing strikers during the term of the Strike Settlement Agreements, the Company did not breach the Agreements, save in minor respects. The Court of Appeals revised these rulings with respect to a few of the strikers. 6a-7a, 11a, 25a-40a, 92a-100a, 107a-119a, 149a-171a.

In the NLRB proceeding the Board, upheld by the Court of Appeals, found, on the basis of the records in both the NLRB proceeding and the § 301 suit:³

that the Strike Settlement Agreements were carried out by the Company in good faith, 48a-49a, 57a, 60a, 217a, 222a;

³ The Board said: "We concur in the Trial Examiner's characterization of Judge Clarie's opinion as being 'a masterly analysis of all the facts and circumstances of the situation.'" 217a.

that the Company did not deliberately or in bad faith depress the employee complements during the term of the Agreements, and did not violate the Act by not restoring full complements by the termination date of the Agreements, 61a, 216a-219a; and

that the hiring of new employees and of strikers as new employees, after the Strike Settlement Agreements and the preferred hiring lists expired on December 31, was proper under the Act, as it was under the Agreements, 47a-58a, 210a, 219a-229a, 405a.

The Board also found, in tandem with the District Court's ruling in the § 301 suit, that the Company did not violate the Act in recalling and placing strikers during the term of the Agreements, with the exception that there was a violation with respect to those few strikers whose treatment the District Court had ruled violated the Agreements. 219a, 405a-407a. The Court of Appeals remanded these rulings to the Board for further consideration. 58a-66a.

REASONS FOR DENYING THE WRITS

Introduction

These two "inextricably intertwined" (7a) § 301 and NLRB cases followed a strike which occurred in 1960 and which was settled in that year by three "inter-related" (100a) written, signed agreements, including Strike Settlement Agreements providing standards and procedures for reinstatement of strikers, negotiated by competent representatives of both sides, ad-

vised by competent attorneys. The Union's assertions, strenuously advanced below and now in this Court, that the Company misinterpreted and misapplied the Strike Settlement Agreements, and that it administered them with "evil motives" (112a), to deny reinstatement to some of the strikers (the great majority of whom were reinstated pursuant to the Agreements), have been rejected by the District Court, the NLRB and the Court of Appeals in unassailable findings of fact based upon and supported by the voluminous and complex records in the two cases. There is no basis for this Court to undertake to examine the records of the cases and the findings derived therefrom by the two courts and the NLRB.

Similarly, there is no basis for review by this Court of the judgment of the Court of Appeals, well supported by the records in the two cases, that the hiring actions taken by the Company in 1961, after the expiration of the Agreements and in keeping with the Agreements, were in accord with Board law as it then stood and ought not to be overridden retroactively by Board law as it developed years later. The Court of Appeals, in whose discretion the issue of retroactive application of agency actions lies, applied well-established standards, based on a landmark decision of this Court, in resolving this question of law.

In short, the actions at issue present no novel question affecting Federal law, nor does the decision of the Court of Appeals misapprehend or misapply the standards for review of trial court and administrative agency decisions. Accordingly, the petition for writs of certiorari should be denied.

I. There Is No Basis for Review by This Court of the Correct Decision of the Court Below in the § 301 Suit.

A. The District Court received and heard and reviewed the evidence in a long trial and found as fact, in a long and careful opinion (pp. 8-9, *supra*):

that there was no commitment inside or outside the Strike Settlement Agreements to restore employee complements to their pre-strike levels by the termination date of the Agreements and the preferred hiring lists, or to reinstate all strikers by then, or to reinstate them without regard to business needs and conditions;

that the Company carried out the Agreements in good faith and did not deliberately and in bad faith depress employee complements to avoid reinstating strikers, but rather the complements were not restored because of production imbalances caused by the strike; and

that the hiring of strikers and new employees that occurred after the expiration of the Agreements (pp. 6-7, *supra*), was in accord with the Agreements and did not demonstrate any purpose on the Company's part to keep the employee complement depressed until the Agreements expired.

The Court of Appeals reviewed and upheld these findings of fact in its own long and careful opinion (pp. 8-9, *supra*).

The essence of the petition is that the Court should undertake to review the voluminous record in the case and reverse these findings of fact, which petitioners attack by means of selective citation to the record and the opinions below. The petition is a trial brief. It makes again to this Court the arguments about the facts which were made to, and which were rejected by, the courts below. Virtually every argument in the

petition rests on a view of the facts not accepted by the courts below. The Court of Appeals having applied the test of Rule (52a), Fed. R. Civ. Proc., to the District Court's findings of fact (12a), and found them not wanting,⁴ there is clearly no basis for this Court to review those findings. Not only were the findings not "clearly erroneous" they were, as the opinions below demonstrate, clearly correct.

The Union's § 301 petition comes down to this—that however many strikers were in fact reinstated pursuant to the 1960 Agreements, no striker should have been left unreinstated and, therefore, to the extent the Agreements did not result in reinstatement, they should be read today as a dead letter, or the facts should now be found to make them a dead letter. The contention is baseless. As the District Court noted:

"Where the settlement contract affords the plaintiffs' membership greater rights than the national labor law, they tenaciously stress the terms of the settlement contract; but where the inverse position would seem to be more advantageous, they minimize the applicability of the contract terms and seek to apply principles and policies embodied in established precedents under the federal labor law." (112a).⁵

⁴ For example: "The Union's theory depends upon acceptance of the idea that the Company developed an elaborate charade to obtain an ample—but not too ample—level of production. It also ignores the fact that there may have been difficulties regaining normalcy in a section after a bitter and protracted strike, as the Operating Committee minutes reveal were present at the East Hartford Machine Shop. [fn., § 301 J.A. 2350.] That the district court rejected this scenario was within its proper role as trier of fact." 25a.

⁵ The Union even acknowledges (§ 301 Pet. 30) that the Agreements granted greater reinstatement rights than the Act.

Competent representatives of both parties, advised by competent attorneys on both sides, negotiated the Agreements. The Agreements are enforceable under § 301. *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962). The Agreements contained a time limit. Had the parties, *negotiating in the factual and legal circumstances then existing*, (including, *inter alia*, the Company's hiring of permanent replacements for strikers during the month preceding the end of the strike), understood that reinstatement was promised or certain or legally required for all strikers, then the Agreements would have so reflected and would not have contained any time limit at all. Instead, the parties negotiated Agreements that extended the preferred hiring lists for 4½ months. This allowed for the possibility of, and achieved, reinstatement for strikers replaced during the strike by permanent hires and for strikers whose jobs were otherwise unavailable when the strike ended. And the final result was the reinstatement of the great majority of the strikers. Moreover, as the courts below found (21a-25a, 123a-149a), the hiring that occurred in 1961 after the expiration of the Agreements, which was necessitated by business conditions and much of which occurred in areas where most or all strikers had already been reinstated (pp. 6-7, n.2, *supra*), was also in keeping with the Agreements⁶ and reflected no purpose to frustrate the Agreements.

Accordingly, for all the reasons stated, there is no basis for review by this Court of the rulings of the

⁶ In the District Court the Union did not challenge the post-December 31 hirings as violations of the Agreements (123a-124a), although in this Court (§ 301 Pet. 27-28) it appears to argue, despite the findings of the courts below, that the Agreements should be "reformed" to extend the termination date.

courts below that the Agreements did not require reinstatement of all strikers.

B. Arguments III and IV of the § 301 petition challenge the extensive and detailed decisions of the courts below reviewing the Company's actions during the term of, and pursuant to, the Strike Settlement Agreements, in reinstating and placing strikers, including the resolution of competing claims for placement between strikers and non-strikers, and also among strikers. 6a-7a, 11a-12a, 25a-40a, 92a-100a, 107a-119a, 149a-171a. This is another instance of the Union, having made the Agreements and gained reinstatement of thousands of strikers pursuant to them seeking [as the District Court noted (112a)] to have it both ways. In fact, the decisions reached by the District Court, as modified in some respects by the Court of Appeals, achieved perfectly appropriate and fair readings of the Agreements, and resolutions of the myriad questions of placement which inevitably arose in administration of the Agreements involving thousands of strikers in a highly complex industrial setting. The Union's various contentions that all the strikers' claims for placement should be granted, whatever the circumstances of the non-striker with a competing claim, or whatever and wherever the job from whence the striker came as compared to the job which the Union claimed for him, were correctly evaluated by the courts below. Such claims of the Union on placement issues as were rejected by the courts below are supported neither by the Agreements nor by case law.

The Court of Appeals also remanded some of these placement questions to the Board for further consideration, in light both of the Agreements and the Statute. 58a-66a. The Union says (§ 301 Pet. 44) that

"even if certiorari were to be denied on all other issues," this Court should consider the Union's claims that relate to the remanded issues. Clearly, however, there is no basis for this Court to be involved. The remand should go forward and the Board should consider and decide the issues, as instructed by the Court of Appeals.

II. There Is No Basis for Review by This Court of the Court of Appeals' Correct Decision Not To Apply Retroactively the 1967 and 1968 Fleetwood and Laidlaw Cases to the Events of the 1960 Strike Settlement Which Were at Issue in This Case.

A. The court below adhered to well-settled principles in refusing to apply retroactively *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967) and *The Laidlaw Corporation*, 171 NLRB 136 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), to the instant case. Placing primary reliance on the test formulated by this Court in *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194 (1947) [hereinafter, "Chenery II"], as discussed in *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972) [hereinafter "RWDSU"], the Court of Appeals found that under the circumstances of the instant case, it would be "unwarranted" and "unjust" to apply these precedent-changing cases to facts which occurred in 1960—fifteen years prior to the decision at issue. 55a-57a.

This Court projected a "rather pointed hint"⁷ in *Chenery II* that retroactivity in administrative decision-making is not favored. The Court declared:

⁷ *NLRB v. Majestic Weaving Co., Inc.*, 355 F.2d 854, 860 (2d Cir. 1966).

"Since [an agency] unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct. . . ." 332 U.S. at 202.

The following standard of close scrutiny of retroactivity was thus formulated by the *Chenery II* Court:

"[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." 332 U.S. at 203.

The outcome of the *Chenery II* balancing test "is in each case a question of law, resolvable by the reviewing courts . . ." *RWDSU*, 466 F.2d 380, 390, citing *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

Since *Chenery II*, courts have repeatedly voiced their disapproval of retroactive application by the NLRB of new standards of conduct to replace prior settled standards formulated through administrative quasi-adjudication; and in some such cases, courts have found retroactive application to have been an abuse of discretion by the Board. See, e.g., *NLRB v. Guy F. Atkinson Co.*, supra; *NLRB v. E. & B. Brewing Company*, 276 F.2d 594 (6th Cir. 1960), cert. denied, 366 U.S. 908 (1961); *NLRB v. Majestic Weaving Co., Inc.*, supra; *RWDSU*, 466 F.2d at 387-93. See also discussion of Judge Friendly in *H & F Binch Co. v. NLRB*, 456 F.2d 357, 364-365 (2d Cir. 1972).

In *RWDSU, supra*, where the D.C. Circuit refused to apply *Laidlaw* and *Fleetwood* retroactively, 466 F.2d at 387-393, Judge McGowan examined the *Chenery II* standard in light of its above-cited progeny, and developed a list of five factors to be weighed in determining whether retroactivity was appropriate under *Chenery II*:

“(1) [W]hether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of burden which a retroactive rule imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.” *RWDSU*, 466 F.2d at 390.

In the case at bar, the court below—contrary to petitioners’ assertion (Pet. in NLRB case 31)—expressly “[took] these considerations into account” (55a) in reaching its conclusion that “retroactive application of *Laidlaw* and *Fleetwood* in this case would be unwarranted.” 55a.⁸

The court determined expressly that *Fleetwood* (decided in 1967) and *Laidlaw* (decided in 1968) represented changes in settled law as it existed in 1960 and that those cases imposed duties and established rights that were not extant in 1960. 52a-57a.

Fleetwood broadly held that a striker retains employee status until he secures “regular and substan-

⁸ The cases in which *Laidlaw* was applied retroactively are fully distinguished by the Court of Appeals at 57a, n.49 and in *RWDSU*, 466 F.2d at 391-392, n. 27-29.

tially equivalent employment” elsewhere. 389 U.S. at 381. Importantly, *Fleetwood* did not distinguish between strikers who were permanently replaced and those whose former jobs had been temporarily discontinued due to strike-related business losses.

Fleetwood reversed a Ninth Circuit decision which had held that the right to reinstatement of both permanently and temporarily displaced strikers was determined at the time of their application to return to work. If no appropriate job vacancy existed on that date the strikers lost all right to reinstatement. In so holding, the Court of Appeals had placed primary reliance on the Board’s holdings in *Atlas Storage Division*, 112 NLRB 1175 (1955), *enforced sub nom., Chauffeurs, Teamsters and Helpers “General” Local No. 200 v. NLRB*, 233 F.2d 233 (7th Cir. 1956), and *Brown & Root*, 132 NLRB 486 (1961), *aff’d*, 311 F.2d 447 (8th Cir. 1963).⁹ Reversing the Ninth Circuit, this Court in effect rejected those earlier Board decisions. Thereafter in *Laidlaw* the Board expressly overruled *Atlas Storage, supra*, *Brown & Root, supra*, and *Bartlett-Collins Co.*, 110 NLRB 395, *aff’d sub nom., American Flint Glass Workers Union v. NLRB*, 230 F.2d 212 (D.C. Cir. 1956), holding those decisions to be in conflict with *Fleetwood*. As the court below noted in rejecting an argument by petitioners that *Fleetwood* had not effected a change in the existing law, had *Fleetwood* “not changed the law as it applied to reinstatement of economic strikers but instead simply reaffirmed long-established principles, we doubt that the case would have so immediately

⁹ These cases held, *inter alia*, that the employee status of an economic striker was determined by whether vacancies existed on the date of application for reinstatement.

prompted the Board to change course and overrule three of its prior decisions” 54a.

Thus, both *Fleetwood* and *Laidlaw* established rights and duties that did not exist in 1960. The focus of these cases was not on *why* the job was unavailable. Rather, these two interrelated decisions simply eliminated the relevance of *when* the jobs were unavailable by holding that the employee status of an economic striker was not lost on the date of application for reinstatement if no job vacancy then existed. Thus, as reaffirmed by the Board in *Laidlaw*, *Fleetwood* changed the law respecting the right of reinstatement of *all* economic strikers, irrespective of whether their jobs were temporarily unavailable, permanently eliminated, or filled by permanent replacements. In fact, many of the strikers in the 1960 strike at issue had been permanently replaced. But even putting that fact aside, the Union places exaggerated importance on the distinction between permanent and temporary job unavailability.

With respect to the law which was changed by *Fleetwood* and *Laidlaw*, the court below properly focused on *Atlas Storage* as the pre-1960 case which most closely resembles the instant case on its facts, and which embodies the applicable law as of 1960. In *Atlas Storage*, the job of an economic striker was temporarily discontinued due to strike-related loss of business, i.e., the complement was “depressed”. His application for reinstatement was denied because no vacancy existed due to this complement depression. The Board held that the employer was free to advertise for and hire a new employee when a vacancy later occurred, “[a]s [the striker’s] employment was prop-

erly terminated when he applied for reinstatement.” 112 NLRB 1175, 1180 n. 15.

Petitioners attempt to limit the reach of *Atlas Storage* by distinguishing between temporary and permanent vacancies, despite the fact that no such distinction had been articulated by the Board. The court below found the proposed distinction unacceptable, noting that in any case of job unavailability,

“a striker could reasonably be expected to have an opportunity to regain a position with his employer. In any fairly sizable operation, employee turnover would assure that a job would eventually become available to economic strikers not immediately reinstated at the termination of a strike. This is true not only when a strike has caused a temporary cutback in business but also when a striker has been permanently replaced, or his job absorbed by other workers.” 53a-54a.

In short, in *Atlas Storage*, the striker’s loss of employee status was determined without regard to whether the complement reduction was permanent or temporary. This result was compelled by the fact that an employee’s status was determined as of the date of application for reinstatement—a date when the duration of any existing complement reduction was unknown.

Thus, the law was settled in 1960. It was changed seven and eight years later by *Fleetwood* and *Laidlaw*. It is these facts which primarily distinguish *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), from the case at bar, and demonstrate that petitioner’s reliance on that Title VII case is misplaced.

Albemarle held that, under Title VII, good faith reliance on that which respondent *thought* was the state

of the law at the time it acted was no defense. Contrary to petitioners' argument, however, *Albemarle* is perfectly consistent with the Court of Appeals' decision herein. It fits squarely within the rationale of *Chenery II* and its progeny. This is because under Title VII, a new statute in whose early years virtually all the law was unsettled, good faith reliance was an "appeal to the 'unsettled state of the law,'" *United States v. United States Steel Corp.*, 520 F.2d 1043, 1058-1059 (5th Cir. 1975). Hence, *Albemarle*, and *United States Steel Corp.* as well, in which respondents appealed to the prior deeply unsettled state of the law, do not conflict with the instant case, where the court below found imposition of retroactivity to be improper because, *inter alia*, the later cases overturned settled law.

Petitioners assert that the court below ignored the question of reliance on the prior state of the law, and failed to balance the statutory interest in retroactive application against the burden of retroactivity on the Company. These assertions simply ignore the court's express statement that it "[took] these considerations into account" (55a) in reaching its judgment. The court's consideration of the reliance and balancing factors is also clearly reflected in these statements:

"Because *Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed, it would be unjust to use those cases to impose liability fifteen years after the events at issue transpired. [footnote omitted.]

This is not a case in which the employer sought in bad faith to discriminate against strikers. Both the Board [footnote omitted] and the district court in the 301 case found otherwise. Throughout the strike settlement process, the Company

had the advice of experienced labor counsel. The Strike Settlement Agreements providing for the preferential recall of strikers to jobs in their seniority areas which they were qualified to perform exceeded requirements of existing law. Under these circumstances we are not at this stage disposed to permit imposition of a substantial liability upon the Company." 56a-57a.

The finding that experienced labor counsel advised the Company in reaching a settlement renders nugatory any claim that the Company did not rely on the existing state of the law. Any suggestion that a company advised by experienced counsel or, for that matter, a union also advised by experienced counsel, would not or did not rely on the state of the law when engaging in settlement negotiations is simply not plausible.

Petitioners also speculate that denial of certiorari in the instant case "will inspire widespread gambling with conduct of 'questionable legality' . . . whenever that conduct is less expensive or more profitable than conduct which assuredly does not violate the rights of others." (Pet. in NLRB case 15). Such conjecture is unfounded and based upon a patently erroneous assumption—i.e., that the court below found that the acts in question were of "questionable legality" in 1960. Petitioners base this assertion on the "reasonable grounds for concluding" (54a) language of the court below. This phrase, magnified, misconstrued, and taken out of context by petitioners, is not license for employers to gamble with questionable law. The phrase is simply one of many in the opinion expressing the court's judgment that precedent and logic properly led to the conclusion in 1960 that reinstatement rights of strikers at that time were determined as of the date of application for reinstatement. To construe the decision below

as placing a judicial imprimatur on gambling with "questionable" law is a clear misreading of the court's opinion.

Clearly the Court of Appeals properly exercised its authority and discretion in this case in determining that *Fleetwood* and *Laidlaw* should not be retroactively applied, and there is no basis for review of that decision by this Court.¹⁰

¹⁰ The retroactivity issue only arose as it did in the court below because the Court of Appeals disagreed with the NLRB's finding that the Strike Settlement Agreements negotiated by the parties, which terminated the preferred hiring lists after December 31, constituted a waiver of any statutory striker reinstatement rights after that date. 219a-229a. But it is most important to note that the reason the Court of Appeals rejected the waiver finding was principally because it found (46a-56a) that in 1960-61, before *Fleetwood* and *Laidlaw*, there were no post-December 31 statutory reinstatement rights that could be waived. Thus, the Court of Appeals stated (54a): "For the reason that *Fleetwood*, like *Laidlaw*, in our opinion established rights not existing in 1960, there could have been no knowing waiver of *Fleetwood* rights in this case." (Emphasis added.) It is clear, then, that the Court of Appeals' disagreement with the Board's strongly stated waiver ruling is simply the opposite side of the coin of the court's finding that the law in 1960 did not require reinstatement after December 31, 1960, and that *Fleetwood* and *Laidlaw* later changed the law. The Court of Appeals' disagreement with the waiver ruling is thus not any disagreement at all with the basic Board position that the Strike Settlement Agreements were highly important in the NLRB case. On the contrary, the Court of Appeals, whose whole opinion bespeaks approval of the Strike Settlement Agreements, clearly took the Agreements very much into account in reaching its judgment that *Fleetwood* and *Laidlaw*, which were not the law in 1960, should not be applied retroactively. Thus the Board and the court below were not on opposite tacks in the NLRB case, but were on parallel courses, both placing heavy reliance on the Strike Settlement Agreements in reaching the result that the termination of the preferred hiring lists on December 31 was proper under the Act as it was under the Agreements.

B. Petitioners' final argument in the NLRB case is that the appellate court's decision violated *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943) [hereinafter, "Chenery I"]; 332 U.S. 194 (1947) [Chenery II], which limited the scope of judicial review of administrative agency action. This argument misconstrues both *Chenery* and the decisions below.

Petitioners' argument focuses on three specific limitations allegedly established by the *Chenery* cases and allegedly violated by the Second Circuit. See Petition in NLRB case at 3, 35-36. However, petitioners have over-simplified the first two limitations and produced no authority for the third. First, *Chenery I* does not require that, irrespective of the particular issues involved, an appellate court must judge the propriety of agency action "solely by the grounds invoked by the agency." The Court explicitly limited this restriction on the scope of review to issues involving "a determination or judgment which an administrative agency alone is authorized to make" 332 U.S. at 196. Second, while *Chenery I* stated that a reviewing court may not "guess at the theory underlying the agency's action," 332 U.S. at 196, the decision does not require courts to elevate form over substance. As the Court explained, "We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words." 318 U.S. at 95; see *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), citing *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 595 (1945). Third, *Chenery II* simply did not hold or even imply that a reviewing court may not, after consideration of the

facts of a particular case, deny retroactivity in that case. See 332 U.S. at 202-203, and discussion, *supra*, at pp. 16-17.

Petitioners challenge, as inconsistent with the requirements of the *Chenery* cases, the appellate court's holding that *Laidlaw* and *Fleetwood* should not be applied retroactively to the present case. This challenge is based on a misreading of both *Chenery* and the Board's decision in the instant case.

Petitioners acknowledge that the Board opinion discussed the state of the law at the time of the strike and the Strike Settlement Agreements, but insist that the Board was not concerned with the issue of retroactivity and that the discussions were only an "element" of the Board's "waiver rationale." (Pet. in NLRB case 36). Contrary to the petitioners' claims, however, the Board's analysis was not narrowly limited to the issue of waiver. Instead, the Board stated the issue as "whether to modify Respondent's obligation as defined in the recall agreement in view of *Laidlaw*" 225a. The Board also focused on several factors, including the prior state of the law, which are relevant primarily to the issue of retroactivity. See the Court of Appeals opinion at 55a and discussion, *supra*, at pp. 17-18, 22-23, listing factors relevant to the issue of retroactivity. The Board's opinion clearly indicates its reliance on those factors which strongly support the denial of retroactivity: the new rule represents a clear departure from well-established practice (226a-228a and n.31); respondent relied in good faith on the former rule (225a-226a, 228a); the equities do not favor the imposition of further liability on the re-

spondent (225a-228a); and the statutory objective of "encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes" outweighs any interest in applying the new rule retroactively (228a). See also n.10, *supra*.

Moreover, even if the Board's decision had rested solely on a waiver theory, the court's determination of the retroactivity issue would not in any way violate *Chenery*. Contrary to petitioners' assertions, *Chenery II* does not prohibit a court from denying retroactive application of a newly adopted administrative rule. See discussion, *supra*, at pp. 16-18. Nor is retroactivity "a determination or judgment which an administrative agency alone is authorized to make." As the Court of Appeals recognized, it is a question of law, appropriate for judicial resolution. Opinion at 55a, n.48; see *RWDSU*, *supra*, 466 F.2d 380, 390, citing *NLRB v. Guy F. Atkinson Co.*, *supra*. Furthermore, as discussed in detail at pp. 16-18, 22-23, *supra*, the Court of Appeals was fully aware of and properly applied the guidelines on retroactivity set forth in *Chenery II* and subsequent cases.

Petitioners' remaining contention based on *Chenery* is also baseless. The Trial Examiner, in a finding adopted by the Board and upheld by the Court of Appeals, rejected petitioners' allegation that those strikers not rehired by December 31, 1960, were subsequently discriminated against when they reapplied for employment. 210a, 405a, 57a-58a. These determinations were supported by substantial evidence in the record (22a-25a, 57a-58a, 128a-149a, 210a, 405a; pp. 6-7, n.2 *supra*), which included the § 301 record (217a), and were properly upheld by the reviewing court.

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).¹¹

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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¹¹ The Union asserts in both petitions (§ 301 Pet. 32-35, Pet. in NLRB case 33-35) that the courts below and the Board misallocated the burden of proof with respect to the issue of strike-caused production imbalances, and the reduced employee complements attendant thereto. The short answer to the claim is that, wherever, as an abstract legal matter, the burden on the issue may have lain in the two cases, both courts and the Board clearly found, and the record shows, that the Company in fact proved its contentions with respect to production imbalances and employee complements following the strike. As the Court of Appeals said (62a, n.56): “. . . Furthermore the Board’s findings reveal that this was not a case in which the placement of the ultimate burden of persuasion was decisive of the outcome.” This is clearly borne out in the Board’s decision by the discussion at pp. 217a-218a.

Similarly, in the § 301 proceeding, the extensive discussion by both courts of the “complement depression” issue (10a-14a, 17a-25a, 32a-33a, 119a-149a) shows clearly that they found that the Company fully proved its contentions with respect to the issue. As the District Court said (148a): “While the plaintiffs placed this question [deliberate, bad faith complement depression] in issue by a *prima facie* showing, the defendant assumed its burden of going forward and advanced proof [footnote omitted] which *satisfied the Court*, that it had acted in good faith and was motivated by legitimate and substantial business justification in the performance of its obligations under the Strike Settlement Agreements.” (Emphasis added.)

In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

27 1976

LODGES 743 AND 1746,

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1686

LODGES 743 AND 1746,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-82a) is reported at 534 F. 2d 422. The Board's decision and order (Pet. App. 209a-247a) are reported at 192 NLRB 382. The decision of the district court (Pet. App. 83a-197a), in a companion proceeding, is reported at 299 F. Supp. 877.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1975 (Pet. App. 1a). On December 22, 1975, the court of appeals denied the unions' petition for rehearing and suggestion for rehearing in banc (Pet. App. 483a-484a). By order dated March 11, 1976 (Pet. App.

485a), Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 20, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly held that economic strikers were not entitled to a preference in reinstatement after expiration of the 4-1/2 month preferential hiring period provided in a strike settlement agreement between the company and the union.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), and of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) are set forth in Appendix A of the petition in No. 75-1729, a companion case.

STATEMENT

A. Introduction

The opinion of the court of appeals covers two related cases, which were argued together (Pet. App. 5a-7a). In the instant case, No. 75-1686, petitioners challenge parts of the decision below that relate to review of an order of the National Labor Relations Board in an unfair labor practice proceeding (Pet. App. 45a-66a, 216a-219a). In No. 75-1729, petitioners challenge parts of the decision below that relate to an appeal from the district court in a suit for violation of collective bargaining agreements under Section 301 of the Labor Management Relations Act (Pet. App. 7a-45a, 83a-197a). The factual background of both cases is the same. In the Section 301 proceeding, the district court

dismissed, for the most part, petitioners' claims that United Aircraft Corporation ("the Company") breached a strike settlement agreement by failing to reinstate certain strikers. In the unfair labor proceeding, the Board, adopting the findings of the district court as well as those of the trial examiner (Pet. App. 60a-61a, 218a), dismissed, for the most part, petitioners' charges that the Company's failure to reinstate the strikers violated the National Labor Relations Act.

B. The Board's Findings of Fact

On June 8, 1960, petitioners ("the Union") launched a major economic strike against the Company at four plants in Connecticut (Pet. App. 4a). The strike lasted nine weeks and was marked by extreme violence and mutual antipathy (*ibid.*). In August 1960, the parties agreed to settle the strike (Pet. App. 90a-92a, 331a). The strike settlement consisted of three parts: (1) new collective bargaining agreements for the four plants; (2) an agreement to submit to arbitration the cases of 50 strikers accused of serious strike misconduct; and (3) striker recall agreements (hereafter "the recall agreement") establishing a procedure to govern the recall of strikers at the four plants (Pet. App. 4a-5a, 100a, 331a).

Under the recall agreement, strikers who registered for reinstatement were to be recalled in three phases (Pet. App. 8a-9a).¹ Under Phase 1, strikers whose pre-strike jobs were available at the end of the strike were to be reinstated to those jobs (Pet. App. 9a). If a striker's pre-strike job was not available, he was to be recalled, under Phase 2, to certain other defined jobs for which he was qualified (*ibid.*). Finally, strikers for whom no

¹The language of the recall agreement for plants in the Company's Hamilton Standard Division differed slightly from that for plants in its Pratt & Whitney Division (Pet. App. 8a-9a, n. 3).

jobs were available under Phase 1 or Phase 2 were to be placed on a preferential hiring list for recall to job openings which "develop at any time prior to January 1, 1961 before new employees are hired" (Pet. App. 8a-9a, n. 3).

Some 6,500 strikers registered for reinstatement and some 4,500 of these strikers were reinstated from the inception of the agreement in August 1960 until expiration of the preferential hiring period on December 31, 1960 (Pet. App. 10a, 126a-127a, 128a-129a).² Other registered strikers resigned, retired, died, or were discharged for strike violence pursuant to the arbitration agreement (Pet. App. 10a, 127a, 129a). In addition, some registrants failed a job physical and some refused offers of recall (*ibid.*). When the recall agreement expired at the end of 1960, there were 1,562 registered strikers remaining on the preferential hiring list who had not been recalled (Pet. App. 10a).³

The Company administered the striker recall agreement in good faith and did not artificially depress the employee complements during the 4-1/2 months in which strikers were accorded preferential hiring rights to available jobs under the agreements (Pet. App. 14a, 17a-25a, 57a, 130a-

²More than 3,000 registered strikers were reinstated to their previous jobs under Phase 1, approximately 900 were recalled to similar jobs under Phase 2, and 630 were recalled from the preferential hiring list under Phase 3 (Pet. App. 10a).

³In response to a request by Union negotiators in pre-settlement discussions for an estimate of the number of strikers who would not be returned to work, the Company's Vice President for Industrial Relations, Martin F. Burke, made a rough estimate that between 400 and 500 strikers at Hamilton Standard would have no jobs at the end of the strike (Pet. App. 15a, 91a). At Pratt & Whitney, Burke estimated that the number would be larger (*ibid.*). But Burke also repeatedly stressed that it was very difficult to make any estimate (Pet. App. 15a, n. 5).

149a, 217a-218a).⁴ Some of the registered strikers were not recalled under the agreement because their jobs were filled by permanent replacements hired during the strike (Pet. App. 47a-48a); other registered strikers were not recalled because the employee complement was depressed as the result of the post-strike production problems and business exigencies (Pet. App. 13a, 18a-25a, 130a-148a).⁵

After the expiration of the recall agreement on December 31, 1960, the Company wrote the strikers who had not been reached for recall, inviting them to apply for employment as new employees, and about 1,200 responded (Pet. App. 127a-129a). The Company, in early 1961, hired 450 of these applicants (Pet. App. 58a).⁶

C. The Board's Decision

The Board, with two Members dissenting, concluded that, although it was not bound by any private agree-

⁴The Board found that the evidence submitted by the General Counsel and the Union regarding the depression of the employee complement below pre-strike levels "provided at most a *prima facie* showing of a violation," which the Company answered by showing legitimate business reasons for the depression (Pet. App. 219a). The Union and the General Counsel then failed to sustain their burden of overcoming the Company's answer (*ibid.*).

⁵As the court below found, strike-related production problems were expressly within the contemplation of the parties when they negotiated the striker recall agreement, although they could not foresee the extent and duration of the reduced complements. Thus, the recall agreement was made under the assumption that business considerations might prevent reinstatement of some strikers, albeit temporarily. In short, it was contemplated that some strikers' jobs would not be "available" within the meaning of the agreement (Pet. App. 16a-17a).

⁶The Company hired proportionally more striker applicants than it hired non-striker applicants. During the same period, in which it hired 450 out of 1,200 striker applicants, it hired 1,593 out of 17,000 non-striker applicants at Pratt & Whitney (Pet. App. 128a), and 382 new employees from among several thousand applicants at Hamilton Standard (Pet. App. 129a, n. 12).

ment "waiving" rights guaranteed by the Act, the statutory policy of encouraging the practice and procedure of collective bargaining would be furthered by giving effect to the limitation on the strikers' reinstatement rights adopted by the parties in their strike settlement agreement here. Accordingly, the Board held that the Company did not violate Section 8(a)(3) and (1) of the Act by denying the strikers, in conformity with the terms of the recall agreement, preferential hiring rights, and treating them as applicants for new employment, after December 31, 1960 (Pet. App. 221a-229a).⁷

The Board rejected the view of the trial examiner (Pet. App. 404a-405a) that the Board's 1968 decision in *Laidlaw Corp.*, 171 NLRB 1366, enforced, 414 F. 2d 99 (C.A. 7), certiorari denied, 397 U.S. 920, should override the recall agreement. There, the Board, applying the principles enunciated in *National Labor Relations Board v. Fleetwood Trailer Co.*, 389 U.S. 375, reversing 366 F. 2d 126 (C.A. 9),⁸ held that an economic striker does not lose his right to reinstatement merely because a permanent replacement is in his job when he initially applies

The Board also adopted the trial examiner's finding that the Company did not otherwise discriminate against those strikers not rehired by December 31, 1960, when they reapplied for employment (Pet. App. 57a-58a, 210a, 405a). However, in the Section 301 proceeding, the district court found that the Company had violated the recall agreement, in some instances, by transferring and promoting junior employees into jobs which the strikers could have filled. 299 F. Supp. at 918-924. The Board adopted the trial examiner's finding that this conduct also constituted violations of Section 8(a)(3) of the Act (Pet. App. 219a).

In *Fleetwood*, the Court held that an economic striker retains his status as an employee under Section 2(3) of the Act, 29 U.S.C. 152(3), until he obtains regular or substantially equivalent employment. Thus, a striker whose job is not available when he initially applies, because of a temporary decline in production, is entitled to reinstatement when the job subsequently opens up. 389 U.S. at 380-381.

for work; in the absence of a legitimate and substantial business justification, the employer is obligated to reinstate him should an appropriate job subsequently become available.

Neither *Fleetwood* nor *Laidlaw*, however, concerned a strike settlement agreement. In declining to apply *Laidlaw* and in giving effect to the recall agreement, the Board relied on the following factors (Pet. App. 225a-226a): (1) the agreement was the result of good faith collective bargaining; (2) the Union's negotiators were top officials of the Union who were experienced, competent, and knowledgeable; (3) the Company had made concessions on disputed issues in order to reach agreement, which it might not have been willing to make if it had known that the Union would repudiate part of the agreement, and the Union had not only accepted the agreement's benefits but was suing to enforce the agreement under Section 301; (4) the Company acted in good faith in entering into and administering the recall agreement; and (5) the agreement did not constitute an attempt to undermine the Union since the Company contemporaneously signed a new collective bargaining contract with the Union.

The Board added (Pet. App. 226a-228a):

Moreover, *Laidlaw* was not decided until 1968. At the time the recall agreement was signed in 1960, the prevalent rule could reasonably have been regarded as having been that an economic striker's right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list.⁹ Thus in agreeing to give strikers for whom

⁹The Board cited "*Brown and Root, Inc.*, 132 NLRB 486 (1961, enf'd. 311 F. 2d 447 (C.A. 8); *Atlas Storage Division*, 112 NLRB 1175,

jobs were not immediately available preferred hiring status for approximately 4-1/2 months after termination of the strike, [the Company] gave them reinstatement rights which exceeded the requirements of the law as it was then understood.

D. The Court of Appeals' Decision

The court of appeals sustained the Board's conclusion that the Company did not violate Section 8(a)(3) and (1) of the Act by denying reinstatement to strikers after expiration of the preferential hiring period under the recall agreement, but found it unnecessary to determine whether a union may waive striker reinstatement rights by contract (Pet. App. 52a-57a). In the court's view, at the time the parties entered into the agreement in 1960, the state of the law was such that the Union could not have knowingly waived the statutory right to reinstatement ultimately accorded strikers under *Fleetwood* and *Laidlaw*, *supra* (Pet. App. 52a-54a). Moreover, the court found that "the Union was under the impression that the principal reason that strikers would not be reinstated immediately was that they had been permanently replaced"; thus, "the issue of temporary job unavailability beyond the expiration of the Agreements was not a consideration" (Pet. App. 54a-55a).

1180 (1955), *enfd. sub nom. Chauffeurs, Teamsters, and Helpers "General" Local No. 200 AFL*, 223 F. 2d 233 (C.A. 7); *Bartlett-Collins Company*, 110 NLRB 395, 397-398 (1954), *enfd. sub nom. American Flint Glass Workers' Union v. N.L.R.B.*, 230 F. 2d 212 (C.A. D.C.) cert. denied 351 U.S. 988." It noted that these cases were "specifically overruled in *Laidlaw*" (Pet. App. 226a-227a, n. 31).

The Board also noted (Pet. App. 227a, n. 31) that, at the time of the parties' agreement in 1960, "there was specific precedent for the validity of the recall agreement" in a case decided two years before *Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495.

In the court's view, the fundamental question was whether "*Fleetwood* and *Laidlaw* should be applied retroactively to 1960" (Pet. App. 55a). The court concluded that, because those decisions "imposed duties on employers which had not [theretofor] existed, it would be unjust to use those cases to impose liability [on the Company] fifteen years after the events at issue transpired" (Pet. App. 56a-57a).¹⁰ The court noted that the Company had acted in good faith, that the Union had the benefit of experienced labor counsel throughout the strike settlement process, and that the rights granted strikers under the striker recall agreement exceeded the requirements of then existing law (Pet. App. 57a). Under these circumstances, the court held, "we are not at this stage disposed to permit imposition of a substantial liability upon the Company" (*ibid.*).

The court further concluded that substantial evidence supported the Board's adoption of the trial examiner's finding that the Company did not discriminate against strikers as applicants for employment after expiration of the striker recall agreement (Pet. App. 57a-58a). But it set aside and remanded for additional proceedings

¹⁰The court stated (Pet. App. 55a-56a):

*** *Laidlaw* expressly overturned a well-established rule existing in 1960 that the reinstatement rights of permanently relaced strikers were determined at the time of application for re-employment. *Fleetwood* was not so abrupt a departure from precedent as *Laidlaw* in that the Board had not spoken to the precise issue presented in *Fleetwood*. But a reasonable reading of decisions existing in 1960, particularly *Atlas Storage Division*, *supra*, would be that the same rule applied to strikers whose jobs were temporarily unavailable at the close of the strike.

See also Pet. App. 54a: "*Fleetwood*, like *Laidlaw*, *** established rights not existing in 1960," when the parties entered into the strike settlement agreement.

the Board's Section 8(a)(3) findings which had been predicated on the district court's breach of contract findings (see n. 7, *supra*).¹¹

ARGUMENT

1. The Board found that in the strike settlement agreement the Company and the Union agreed, as part of a bargain on multiple issues, that the strikers' entitlement to a preference for jobs would extend through December 31, 1960, but not longer. In concluding that this bargain was valid, the Board relied on a number of factors: (a) the agreement was the result of good faith collective bargaining; (b) the Union's negotiators were experienced and competent labor counsel; (c) the Company acted in good faith in entering into and administering the agreement; (d) the agreement was fair and reasonable in according strikers preferential hiring rights for 4-1/2 months; and (e) at the time the agreement was entered into, "the prevalent rule could reasonably have been regarded as having been that an economic striker's right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list" (*supra*, p. 7).

¹¹In the Section 301 case, the court remanded to the district court, for proceedings consistent with its opinion, issues relating to the Company's promotions and transfers during the term of the recall agreement (Pet. App. 25a-38a). In the instant unfair labor practice case, the court directed the Board to make "an independent legal assessment" of whether the Company's handling of transfers and promotions violated the National Labor Relations Act (Pet. App. 64a). The court also directed the Board to determine independently whether the Company had engaged in unlawful discrimination by reinstating all non-strikers who were absent from work during the strike while at the same time denying reinstatement to some strikers (Pet. App. 65a-66a, n. 60).

The court below, finding that the right of an economic striker to a preference for jobs which become available after his initial application for reinstatement was not established until the decisions in *Fleetwood* and *Laidlaw*, *supra* (decided in 1967 and 1968, respectively), held that the parties could not have bargained away rights which they did not know existed.¹² However, the court, after considering the same factors which the Board had, concluded that it would be inequitable in this case to apply *Fleetwood* and *Laidlaw* retroactively, and thus the court sustained the Board's ultimate conclusion that the Company did not violate Section 8(a)(3) and (1) of the Act by declining to accord the strikers a preference in hiring after December 31, 1960 (*supra*, pp. 8-9).

It is apparent that, despite different angles of attack, the underlying rationale of the decision of the court and the Board are the same, namely that, in the particular circumstances of this case, the settlement agreement, which was made in good faith and at arm's length, should not be set aside because of subsequent judicial illumination of the rights of the parties had they made no agreement. Since the Board and the court considered the same factors and reached the same ultimate conclusion, the fact that the court utilized a rationale different in some respects from the Board's, without first remanding the case to the Board, did not, as petitioners contend (Pet. 35-36), violate the precepts of *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80. Where, as here, it is clear that the agency

¹² If such rights did exist prior to *Fleetwood*, as petitioners argue (Pet. 23-27), the judgment below could still be supported on the ground that the Board properly concluded that the rights were limited by the strike settlement agreement. Accordingly, if this Court grants the petition for certiorari we reserve the right to support the judgment on the alternative ground that the decision of the Board was correct in its rationale.

would reach the same result as the court, a remand is not necessary, for "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 766, 767 n. 6 (plurality opinion). Cf. *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 526-527 n. 14. For this reason, and because the propriety of upholding the agreement establishing and setting limits to the strikers' reinstatement preference turns on the unique facts of this case, the decision below presents no issue warranting review by this Court.

2. The decision below does not conflict with the cases cited by petitioners, which reject the "unsettled state of the law" as a defense for statutory violations allegedly undertaken in a good faith belief that the conduct was lawful (Pet. 17-21).¹³ Those cases are factually distinguishable.¹⁴ Moreover, it is apparent that the court below did not intend to disturb the settled distinction between "[retroactive clarification of uncertain law] and retroactive change in clear law" (Pet. 22, n. 12).

¹³See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-417; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 496; *United States v. United States Steel Corp.*, 520 F. 2d 1043, 1059 (C.A. 5), petitions for certiorari pending, Nos. 75-1475, 75-1478.

¹⁴In *Albemarle* and *United States Steel Corp.*, *supra*, the employer and the union violated the "primary objective" of Title VII of the Civil Rights Act of 1964 by maintaining a seniority system which perpetuated the "barriers that have operated in the past to favor * * * white employees over other employees." *Albemarle*, *supra*, 422 U.S. at 417, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430. The parties could not escape liability for remedying their violation of black employees' rights merely by showing an absence of "bad faith," for sustaining such a defense would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries

Thus, the court's opinion reflects (Pet. App. 55a) that the court applied the retroactivity principles enunciated in *Retail, Wholesale and Department Store Union v. National Labor Relations Board*, 466 F. 2d 380, 390 (C.A. D.C.) (Pet. 22), which gives retroactivity to a clarification but not to a change in clear law.¹⁵ The

suffered through past discrimination." 422 U.S. at 421. See also *United States Steel Corp.*, *supra*, 520 F. 2d at 1059.

By contrast, the agreement between the Company and the Union in the present case was not unlawful but represented a good faith effort by the parties to define strikers' reinstatement rights through collective bargaining rather than through litigation. Moreover, the Union, with the aid of experienced legal counsel, was clearly seeking to enhance the reinstatement rights of strikers and the agreement could reasonably have been perceived to have that effect under the law as it existed at that time. In these circumstances, the Board reasonably concluded that, far from frustrating a central purpose of the Act, the parties' agreement served to promote the statutory policy of encouraging the settlement of industrial disputes through collective bargaining (Pet. App. 228a).

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, *supra*, the question was whether the damage period for United's violation of the antitrust laws should be abated because of its alleged reliance on legal precedents which were subsequently overruled. The Court found "no occasion to pass upon [this] theory," since it found that there was no "clearly declared judicial doctrine upon which United relied." 392 U.S. at 496.

¹⁵Petitioners contend (Pet. 28-29) that there was no evidence or finding that the Company "significantly relied upon" the prior state of the law. However, where, as here, the parties have entered into a settlement agreement, defining striker reinstatement rights, the employer certainly relies on that agreement as establishing the extent of his obligation to seek out and offer reinstatement to strikers. In this context, it is the Company's action in conformity with the settlement agreement that supplies the element of good faith reliance.

opinion further reflects (*supra*, p. 9, and n. 10) that the court viewed *Fleetwood* and *Laidlaw* (at least in combination) as "overruling" decisions, rather than as decisions which merely clarified "previously unsettled law" (Pet. 21).¹⁶

Accordingly, the issue boils down to whether the court below was correct in concluding that "*Fleetwood*, like *Laidlaw*, * * * established rights not existing in 1960" (Pet. App. 54a). This question, which turns on an interpretation of past Board decisions and which, because of the passage of time since *Fleetwood*, is unlikely to have significance beyond this particular case, does not warrant review by this Court. In any event, the court below had adequate support for its conclusion that, although "*Fleetwood* was not so abrupt a departure from precedent as *Laidlaw*," a reasonable reading of the decisions existing in 1960 could have led to the view that temporarily displaced, like permanently replaced, strikers were not entitled to preferential hiring rights if no jobs were available when they applied for work at the end of the strike (Pet. App. 55a-56a).¹⁷

¹⁶This is confirmed by the fact that the court noted that in *H. & F. Binch Co. Plant of Native Laces v. National Labor Relations Board*, 456 F. 2d 357, 365 (C.A. 2), it had upheld a Board order applying *Laidlaw* retroactively. It explained that the "failure to reinstate in *Binch* had occurred after the Supreme Court's decision in *Fleetwood*," which "should have demonstrated the erosion of employee[r]s' freedom in treating jobless economic strikers as new applicants' * * *" (Pet. App. 57a, n. 49). Cf. *Retail, Wholesale and Department Store Union, supra* (Pet. 22, 28), declining to apply *Laidlaw* to events occurring prior to *Fleetwood*.

¹⁷Petitioners contest (Pet. 23-27) the court's reliance on *Atlas Storage Division*, 112 NLRB 1175, 1179-1180, enforced *sub nom. Chauffeurs, Teamsters & Helpers "General" Local No. 200 v. National Labor Relations Board*, 233 F. 2d 233 (C.A. 7). According to petitioners, *Atlas* involved the permanent abolition or absorption

3. Petitioners contend that the Board and the court of appeals erroneously failed to place the burden on the Company of proving justification for not restoring full production, and reinstating all the strikers, prior to expiration of the recall agreement (Pet. 33-35). But, as the court noted, the Board "found that the Company had * * * rebutted the *prima facie* case of discrimination" and "the Union and General Counsel then failed to overcome that answer" (Pet. App. 61a, n. 56, 218a-219a). "Thus, the preponderance of the evidence remained on the side of the Company" (Pet. App. 61a, n. 56). By contrast, "[t]he employer in *Fleetwood* had presented no evidence in justification" (Pet. App. 61a-62a, n. 56).

of a striker's job and thus could not have been read as suggesting that strikers for whom jobs were only temporarily unavailable would also lose their reinstatement rights (Pet. 24, 25, n. 15). However, in *Atlas*, although the employer had lost business so that the striker's job had been abolished or absorbed by other employees at the time he applied for work, a vacancy occurred three days later when one of the employees was injured and had to be replaced (112 NLRB at 1180, n. 15). Nonetheless, the Board concluded that, since no job was available on the date the striker applied, he lost his right to reinstatement and the employer was free to hire someone else to fill the job (*ibid.*). Moreover, in *Fleetwood*, the Ninth Circuit relied on *Atlas* in concluding that "the right of * * * strikers to jobs must be judged as of the date when they apply for reinstatement," and that, if there are "no jobs available on that date," the employer does "not commit * * * an unfair labor practice by failing to reemploy them." 366 F. 2d at 128-130, reversed, 389 U.S. 375. Following this Court's reversal of the Ninth Circuit's decision, the Board in *Laidlaw, supra*, 171 NLRB at 1370, expressly overruled *Atlas*. See also Pet. App. 226a-227a, n. 31.

Cases cited by petitioners for the proposition that the Board has "consistently distinguished between temporary and permanent complement depression" (Pet. 25, n. 16) are inapposite, for they turn on whether strikers have a reasonable expectancy of reemployment and, therefore, a right to vote in a representation election. A similar rule is applied with respect to laid off employees who have no statutory right to reinstatement. See, e.g., *National Labor Relations Board v. Jesse Jones Sausage Co.*, 309 F. 2d 664, 665-666 (C.A. 4).

4. Finally, petitioners contend (Pet. 37-40) that the Board did not adequately articulate the reasons for each aspect of its decision. But the length of the case and the number of contentions raised by the parties necessitated that some contentions be given relatively condensed or abbreviated treatment.¹⁸ The court of appeals properly concluded that the Board had not failed to make a finding on the Unions' contention that those strikers not rehired by December 31, 1960, were subsequently discriminated against when they reapplied for employment. As the court noted, the trial examiner, whose decision the Board adopted in relevant part, found no pattern of discrimination against strikers as new job applicants and that finding is supported by substantial evidence (Pet. App. 57a-58a). Moreover, since the Company hired a larger proportion of striker applicants than of non-striker applicants and since the General Counsel and the Union failed to offer any evidence of individual discrimination, no extended discussion was required in rejecting the contention that former strikers are *per se* more qualified as new job applicants than are non-strikers.¹⁹

¹⁸In the proceeding before the Board there were more than 30,000 pages of testimony and hundreds of exhibits. In the Section 301 record, which the Board independently reviewed, there were about 10,000 pages of testimony and, again, hundreds of exhibits. The parties filed exhaustive briefs and raised many issues which have now dropped out of the case but which required discussion by the Board or the trial examiner. For example, there were numerous allegations that the Company violated Section 8(a)(1) and (5) of the Act and numerous procedural contentions by all parties (see, e.g., Pet. App. 201a-216a, 229a-235a, 350a-402a, 416a-473a).

¹⁹Cases cited by petitioners on this point (Pet. 38-39) are distinguishable. In *Laidlaw, supra*, 171 NLRB at 1367, 1386-1387, and *Laher Spring and Electric Car Corp.*, 192 NLRB 464, 465-466, there was specific evidence of antiunion motivation in the employer's failure to reinstate strikers. In *Fire Alert Co.*, 207 NLRB 885, 886, the strikers were entitled to reinstatement, not merely to nondiscriminatory consideration as applicants for new employment.

Similarly, the Board adequately articulated its reasons for adopting the district court's findings that the temporary depression of the employee complement was not illegally motivated in this case (Pet. App. 218a-219a, 130a-149a), and for making a contrary finding on the facts presented in *Laher Spring, supra* (see 192 NLRB at 465-466).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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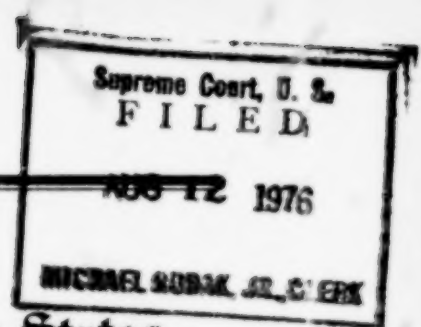
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JULY 1976.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY TO BRIEFS IN OPPOSITION

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1. Board counsel argue that despite the court's rejection of the Board's waiver finding and holding, the "underlying rationale" of its decision is "the same" inasmuch as the court "considered the same factors" (Bd. Opp. p. 11). That statement is palpably incorrect and the error destroys the assumption, said to distinguish *Chenery*, that on remand, the Board "would reach the same result as the court" (*id.*, pp. 11-12).

Of the six factors relied on by the Board (five numbered plus the apparent state of the law, *id.*, pp. 7-8), the court did not "consider" the first three at all. The statement (*id.* p. 9) that "[t]he court noted * * * that

the Union had the benefit of experienced counsel * * * (emphasis added), which makes it appear that the court considered factor (2), is erroneous; in striking contrast to the Board, the court "considered" that "*the Company* had the advice of experienced labor counsel" (57a, emphasis added), a factor relevant, as the court saw it, to the Company's good faith and hence to retroactivity, but obviously not to waiver *by the Union*. In addition, the court considered the other factors (56a-57a), only as bearing on the Company's good faith, which the Board and the courts reject as a defense even in true retroactive overruling situations. See *Laidlaw, American Machinery* and *Erie Resistor*, Pet. pp. 29-30, 36.¹ Board counsel ignore yet another factor on which the court, but not the Board, relied—the passage of time since the inception of this litigation (57a). That factor, plainly irrelevant to waiver, was deemed relevant on retroactivity by the Court of Appeals. The Board surely would not have "considered" delay, since, in accord with this Court's decisions, it has refused to impose the consequences of delay on the victims of discrimination. See Pet. n. 22 at p. 33, last par.

Most important of all, however, the court did not merely fail to rely on factor (3)—consideration for waiver of strikers' rights—on which the Board placed greatest stress; it expressly rejected it, holding that inasmuch as the Company had led the Union to understand that the complements would be restored to normal size by Labor Day, the Union could not be deemed

¹ "Good faith and detrimental reliance have been rejected as an affirmative defense when balancing the equities in awarding damages in * * * labor law." *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377, n. 37 (5 Cir., 1974).

to have contemplated or agreed to the consequences of prolonged complement depression (Pet. p. 4; Pet. in No. 75-1729, pp. 24-25).² In the court's view, on the circumstances which developed, there was *no understanding* and therefore *no agreement* to terminate reinstatement rights.

Thus, in contrast to the Board, the court did *not*, as Board counsel erroneously imply (Opp. p. 11), predicate its rationale or its result upon "the settlement agreement." Accordingly, it is temerarious for appellate counsel to predict that, deprived of the crucial "consideration" underpinning of its reasoning, the Board, on remand, "would reach the same result as the court" (*id.*, p. 12). On the contrary, if the Board were to follow its precedents and policies, it would reach the opposite result, see pp. 7-9, *infra*.

2. The attempt to distinguish "factually" cases rejecting the "unsettled state of the law" defense (Opp. p. 12) is absurd. Judicial power to refuse to enforce a statutory liability because the state of the law was unsettled does not turn on "facts."³

² Although the findings of the court below that the Company represented that the complements would be restored to pre-strike size by about Labor Day are a key predicate of our petitions, the briefs in opposition never refer to them. See Bd. Opp. p. 4, n. 3, p. 5, n. 5, and p. 11; Co. Opp. pp. 8-9, 12-13. Thus it is *they* which ignore the crucial fact "accepted by the courts below" (Co. Opp. p. 13).

³ Moreover, the proffered distinctions (Bd. Opp. pp. 12-13, n. 14), are puerile. Protection of unreplaced economic strikers' reinstatement rights is as essential to effectuate this Act's central policy of "solicitude for the right to strike" (*Erie Resistor*, 373 U.S. at 233-234, Pet. in No. 75-1729, pp. 31-32), as removal of racial barriers is to Title VII's anti-discrimination policy. If striker reinstatement rights are curtailed or infringed by agreement, the

Speculation that the court below did not "intend to disturb the settled distinction" (Opp. p. 12), overlooks that it actually obliterated the distinction by equating

right to engage in future concerted activities does not "remain free." See *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 280 (1956). Because unreplaced strikers' reinstatement rights are personal, they are not subject to limitation or curtailment "through collective bargaining," regardless of the parties' "good faith." (Pet. p. 8, n. 6).

Assertion that "some of the registered strikers [wholly unidentified and unquantified] were not recalled under the agreement because their jobs were filled by permanent replacements" (Bd. Opp. p. 5), is a diversionary irrelevancy. Inasmuch as the Company admittedly had not "eliminated or filled with permanent replacements all positions vacated by the strikers," (*Newspaper Production Company v. NLRB*, 503 F.2d 821, 829-830 (5 Cir., 1974)), none lost employee status and all were entitled to *Fleetwood* rights. Cf. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. at 379, holding that where only 21 replacements were hired during the strike, compared to 55 strikers, none of the six striker applicants had been permanently replaced during the strike. In any event, even if some strikers had been "permanently replaced," others admittedly were not, and, they, incontestably, present the issue.

The theory (Bd. Opp. n. 14, p. 13, first full par.) that unsettled state of the law should be considered a defense in this case because the settlement agreement "represented a good faith effort by the parties to define strikers' reinstatement rights through collective bargaining rather than through litigation" crumbles before the court's finding that the subject of strikers' rights in a complement still temporarily depressed four and a half months after the end of the strike was simply not within the contemplation of the parties (15a-17a, 54a-55a).

There is neither a finding nor any evidence to support the *ipse dixit* (Bd. Opp. n. 14, p. 13, second par.), that the Union "was clearly seeking to enhance the reinstatement rights of strikers * * * under the law as it existed at that time." On the contrary, having won the strike, the Company dictated the terms of the settlement agreement; the Company unilaterally imposed the four and a half month limitation because that "was as long as we wanted to continue the preferred hiring list" (A. 1161). Here, just as in *Fleetwood*, petitioners merely "bowed to the [Company's] decision." 389 U.S. at 381, n. 8.

acknowledged absence of precedent on point (53a), with adjudged nonexistence of a duty.⁴

No manipulation or "combination" (Bd. Opp. p. 14) of *Fleetwood* and *Laidlaw* can obscure the statements in the opinion below that "[t]o our knowledge, there was in 1960 no Board or court decision dealing with precisely those circumstances", and "*Atlas* can be read as applying only when an economic striker's job has been permanently eliminated by an employer." (53a). The court below thereby acknowledged that *Atlas* is reasonably susceptible to a different interpretation than the one it preferred. Yet, it treated its preferred interpretation as the "governing standard" (*RWDSU*, 466 F.2d at 389), and, on that premise, treated *Fleetwood* as "overruling." (Bd. Opp. p. 14). The question thus is the validity of so equating unsettled law with settled law. That question manifestly does not "turn[] on an interpretation of past Board decisions" (Opp. p. 14), or on interpretation of *Fleetwood* or *Laidlaw*, alone or in "combination": it is a question of whether two possible reasonable interpretations can be made to equal one. It is a question which can arise under any statutory scheme, as the *Hanover* case which arose under the anti-trust laws and the *United States Steel* litigation which arises under the Civil Rights Act of 1964 illustrate. See Pet. pp. 18-23. Thus, its potential impact cannot be limited, as Board

⁴"*Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed." (56a). The equation means, of course, that debatable statutory rights and duties do not exist before authoritative adjudication; on that theory, retroactivity is barred in every arguable case of first impression. It is difficult to imagine a proposition better calculated to invite gambling with the statutory rights of others and to multiply litigation on the merits and on the issue of retroactivity as well.

counsel would have it, to the retroactivity of *Fleetwood* rights—which is simply the occasion which gave rise to the unprecedented retroactivity holding in this case.⁵

⁵ Attempts to support the Board's and the court's interpretation of the law as it stood in 1960 require excising language from this Court's decision in *Fleetwood*, and transforming what the Board considered a mere happenstance in *Atlas* into rationale for the holding. Thus, the Company argues that "*Fleetwood* did not distinguish between strikers who were permanently replaced and those whose former jobs had been temporarily discontinued due to strike-related business losses" (Co. Opp. p. 19) and asserts that *Fleetwood* did not focus "on why the job was unavailable." (*id.*, p. 20). Cf. Bd. Opp. n. 8, p. 6. That ignores not only this Court's identification of available defenses as "permanent replacement" and job elimination (389 U.S. at 379), but its explanation of why temporary complement depression cannot qualify as a defense (*id.* at 381): "Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed."

There is neither a finding nor any evidence in *Atlas* to support the Company's assertions that (Co. Opp. pp. 20-21) the striker's job was "temporarily discontinued" or that the loss of business was "strike-related." The court below, Board counsel and everyone else has always considered the job elimination in *Atlas* to have been permanent. Thus, the Company's theory (never stated before in this litigation) why *Atlas* supported its action is unique; this simply confirms how easily a party can, when charged with a violation, conjure up a theory for an "unsettled state of the law" defense. The vacancy in *Atlas* resulted from an unpredictable event, injury (Bd. Opp., n. 17, p. 15), not from intended post-strike complement reflation, as did the vacancies in *Fleetwood*, 389 U.S. at 379, and this case.

Finally, the relevance of the Board's historic recognition of the distinction between "temporary and permanent complement depression" in striker eligibility to vote cases is not diminished, as Board counsel contend (n. 17, p. 15, last par.), by the fact that the Board equated the statutory touchstone—a right to reinstatement—with reasonable expectancy of reemployment, which, in turn, depended in depressed complement cases on whether the depression was temporary or permanent. "[T]he mutual expectation of reemployment justified the Board in treating the employee relationship

The question presented therefore does have "significance beyond this particular case" and clearly does "warrant review of this Court" (*id.*), not only for that reason but also because the answer given by the court below conflicts with all prior decisions on the subject including that of this Court in *Hanover* and that of the D.C. Circuit in *RWDSU*, on which the briefs in opposition mistakenly rely.

3. The Board's Opposition argues (n. 15, p. 13), that the Company's presumed reliance on the settlement agreement as dispositive of strikers' statutory rights supplies the missing element of "good faith reliance" upon "the prior state of the law." But assertion that the Company relied on the *agreement* (*id.*), is a tacit admission that it did not rely on Board or court *decisions validating its conduct*. And the Company's attempt to enlarge the Court of Appeals' carefully circumscribed statement (which is all the record will support) that during the settlement negotiations the Company "had the advice of experienced labor counsel" (57a) into a finding that counsel advised that unrecalled strikers for whom jobs were temporarily unavailable at the end of the strike lost their employee status (Opp. p. 23), is patently untenable, first because no Company witness ever so testified and second, because the Company's actions in this litigation demonstrate that its counsel was well aware that the only strikers whose status was lost were those who had been permanently replaced or whose jobs were permanently abolished (Pet. 28-29, 44-45).

of the laid off men as continuing * * *. It was therefore proper to allow them to participate in the election. *Marlin-Rockwell Corp. v. NLRB*, *supra*, 116 F.2d at 588." *NLRB v. Jesse Jones Sausage Co.*, 309 F.2d 664, 665-666 (4 Cir., 1962).

The court below did not find that the Company had relied on the agreement. That had been the Board's theory, citing, as Board counsel note here, "*Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495" (Bd. Opp. n. 6, p. 8). But Board counsel had conceded in the court below that there was no precedent in 1960 which afforded any rational basis for the assumption that the law allowed strikers' statutory rights to be limited or curtailed by private agreement. (See Pet. n. 8, p. 10)⁶ The occasion for that concession was the Union's demonstration that the *Borg-Warner* case had held that the strikers' statutory rights were not subject to waiver, and had been cited as a non-waivability precedent in the Board's brief to this Court in *Fleetwood*, see n. 8, p. 10 *infra* (last case cited in quote). In fact, as of 1960 (indeed until its decision in this case) every Board and court decision had held that statutory reinstatement rights are not vulnerable—no cases look to the contrary.⁷ As we have seen, n. 6,

⁶ Board counsel there said:

"Of course, even if *Borg-Warner* were indistinguishable on its facts, the instant case and *Laher Spring* would still be the first occasions in which the Board confronted the impact of *Fleetwood* on recall agreements. Accordingly, the existence or absence of this Board precedent—which the Board mentioned in a footnote—is hardly as significant as the Union seeks to suggest." (Bd. Br. in Court of Appeals, n. 11 cont., p. 21)

Yet, having prevailed on a different theory in the court below they now regard *Borg-Warner* to be sufficiently "significant" to cite to this Court without acknowledging their prior concession.

⁷ *Stewart Die Casting Corporation*, 14 NLRB 872, 895, enf'd 114 F.2d 849 (7 Cir. 1940); "nor are the rights of the striking employees . . . under the Act affected in any manner by reason of

supra, until today Board counsel attempted to distinguish the precedents on the ground that they did not

. . . [the union's] . . . acquiescence in the terms and the conditions of the strike settlement." *Poultrymen's Service Corp.*, 41 NLRB 444, 462, enf'd, 138 F.2d 204 (3 Cir. 1943); "[n]or do we find merit in the respondent's contention that the settlement agreement . . . relieved the respondent of any duty it might have to reinstate the strikers." *Mathieson Chemical Corporation*, 114 NLRB 486, 499, enf'd, 232 F.2d 158 (4 Cir. 1956), aff'd 352 U.S. 1020 (1957): "The law 'frown[s] upon any agreement permitting an employer to discriminate against employees who participate in a strike.'" (Emphasis by the Board). *Fitzgerald Mills Corporation*, 133 NLRB 877, aff'd, 313 F.2d 260 (2 Cir. 1963), cert. denied, 375 U.S. 834 (1963): "It is well settled that a union cannot waive the reinstatement rights of strikers" *Laclede Metal Products Co.*, 144 NLRB 15 (1963): "We agree . . . that the strike settlement agreement . . . is no defense. The nine employees who were unlawfully laid off because of the agreement had a statutory right to strike at the time they did so. We find that it was illegal for the Union and the Respondent to agree to any discrimination against them for exercising this right, regardless of whether such agreement resulted from the Respondent's insistence or was wholly voluntary on the Union's part. See *Erie Resistor Corporation*, 132 NLRB 621, 631, footnote 31."

This long line of authority was summarized in *Tanner Motor Livery, Ltd.*, 160 NLRB 1669, 1670-1671, n. 3 (1966): "Moreover, assuming the validity of the Respondent's contention that its strike settlement and contract offers were linked together, Respondent's imposition of its strike settlement offer to require that strikers return to work as new employees, was a clearly unlawful condition. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221. Indeed, had Respondent signed a contract providing, *inter alia*, that returning strikers were new employees, we could in an appropriate proceeding order such a requirement deleted from the contract. *Laclede Metal Products Co.*, 144 NLRB 15; *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19 (C.A. 4), enf'g., 152 NLRB 98[8]. See also *Erie Resistor*, *supra*; *Arlington Asphalt Co.*, 136 NLRB 742, enf'd, 318 F.2d 550 (C.A. 4)."

deal explicitly with *Fleetwood* or *Laidlaw* rights. That is an admission that the Company could not have "relied" in "good faith" on precedents holding *Fleetwood* or *Laidlaw* rights vulnerable to limitation or cut off in a strike settlement agreement.

4. In asserting that the decision below is alternatively supportable on the theory that *Fleetwood* rights are waivable (Opp. 11, n.12), Board counsel again ignore the court's finding that the prospect of complement depression "for the duration of the Agreement was never seriously discussed during negotiations" and that *Fleetwood* rights, therefore, "could not have [been] knowingly waived" (54a-55a). That patently invulnerable finding aside, tender of the waivability issue *increases* the importance of granting certiorari.

Board counsel to the contrary notwithstanding, both *Fleetwood* and *Laidlaw* did "concern [] a strike settlement agreement" (Opp. p. 7). In *Fleetwood*, it was the Board's position throughout that economic strikers' reinstatement rights are not vulnerable to waiver by the collective bargaining agent.⁸ This Court

⁸ In its Brief to the Ninth Circuit, the Board relied on the Third Circuit's decision in *Eric Resistor*, quoted in our Petition herein at p. 30, and went on to say

"* * * the collective bargaining representative's acquiescence in an infringement of employees rights to strike can [not] make lawful the discrimination against employees * * *"

and

"* * * union and employer * * * [cannot enter] into a co-operative arrangement to limit individual statutory rights * * *." Brief for the National Labor Relations Board (9 Cir.), No. 20,511, pp. 10-11.

In its Brief to this Court, the Board responded as follows to the Company's argument that the Union had waived the strikers' reinstatement rights by the settlement agreement:

"When the issue of reinstatement arose, the Union already had lost the strike and had been forced to accept the Com-

expressly reserved that issue (389 U.S. at 375, n. 8). On remand, the Board rested on its original brief, and the Ninth Circuit enforced the Board's order, *per curiam*. 67 LRRM 2768.

In *NLRB v. Laidlaw Corporation*, 507 F.2d 1381, 1382 (1974) (*Laidlaw II*), the Seventh Circuit rejected the Board's assumption of waivability,⁹ holding that "the company had no right to bargain with the union using these employee rights for the ante."

Nor is there anything "unique" (Opp. p. 12), about destroying reinstatement rights by limiting their duration. The identical device was used in *Laher, supra*. And in *Brooks Research & Mfg. Co.*, 202 NLRB 634, 636 (1973), the Board squarely "rejected the [employer's] contention that a time limit should be placed on the reinstatement rights of economic strikers" on the grounds that "such a time limit is contrary to the principles enunciated in *Fleetwood* and *Laidlaw* [and]

pany's pre-strike contract offer (R. 47-48). The Union received nothing in return for the non-preferential plan; it was not even reduced to writing. Moreover, *even if the Union had agreed to a nonpreferential plan, this would not have constituted an effective waiver of the employees' statutory right to reinstatement. Electrical Workers Local 613 v. National Labor Relations Board*, 328 F.2d 723, 726-727 (C.A. 3); *National Labor Relations Board v. E.A. Laboratories, Inc.*, 188 F.2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *Laclede Metal Products Co.*, 144 NLRB 15, 16; *Wooster Div. of Borg-Warner Corp.*, 121 NLRB 1492, 1495; * * *." (Emphasis added.) Brief for the National Labor Relations Board, *NLRB v. Fleetwood Trailer Co., Inc.* No. 49, Oct. Term, 1967, pp. 20-21, n. 11.

⁹ In its brief to the Seventh Circuit in that case, p. 8, the Board had argued that "the Board may, in its discretion, give effect to so-called strike settlement agreements in certain circumstances," citing its decision in the instant case and *Laher Spring*, 192 NLRB 464, 465-466 (1971).

the alleged burden upon an employer is neither onerous nor severe." Accord: *American Machinery Corp. v. N.L.R.B.*, 424 F.2d 1321, 1327 (5 Cir., 1970). *Laidlaw v. N.L.R.B.*, 414 F.2d 99, 105, n. 2 (7 Cir., 1969)

5. Board counsels' assumption (Opp. p. 15), that the burden of proof is the same in rebutting a *prima facie* case of anti-union motivation as in establishing, *ab initio*, a "legitimate and substantial business justification" for failing to restore the complements to pre-strike size as soon as possible (Pet. p. 35; Pet. in No. 75-1729, pp. 33-35) is unwarranted, as the Petitions demonstrate. As shown in the companion petition, the Company did not even undertake to offer an explanation of why it chose not to populate the machine shop to full capacity immediately after the strike, as it did immediately after the settlement agreement. The court below considered such an explanation unnecessary to meet the *prima facie* case; but it is indispensable to establish the requisite affirmative defense.

6. The Company argues that its employment policy must be considered non-discriminatory because "only" 1562 strikers were denied reinstatement (Co. Opp. 5), while Board counsel argue that the size of the record excuses non-compliance with *Chenery* on the post-1960 discrimination issue (Bd. Opp. n. 18, p. 16). The short answer is that 1562 discriminatees is *more than* the Board found to have been discriminated against in *all its other cases combined* in fiscal year 1971.¹⁰ The magnitude of this case and the number and importance of the issues presumably accounts for

¹⁰ In fiscal 1971 the Board ordered "employers to reinstate 1,066 employees with or without back pay [and] to give back pay without reinstatement to 56 employees." *Thirty Sixth Ann. Rep. NLRB* (Gov't Print. Off. 1972), p. 18.

the fact that the Board took two years—from July, 1969 to July, 1971, to decide it. The same factors required more, not less, explanation than customary of the Board's analysis and disposition of each contested issue, particularly novel ones, or ones on which the Board's approach was unprecedented or in conflict with other authority.

Board's counsel's assertion that "no extended discussion was required in rejecting the contention that former strikers are *per se* more qualified as new job applicants than are non-strikers" (Opp. p. 16) is refuted by the fact that that "contention" underlies every other Board case on point, including *Laidlaw*, *Lahey* and *Fire Alert*, and even *NLRB v. Jesse Jones Sausage Co.*, 309 F.2d 664, 667 (C.A. 4), which Board counsel cite in another context. (Opp. n. 17, p. 15). There the court held that: "[giving] jobs in its packing room to seven newly hired persons without offering similar employment to the eight who voted for the union, *despite their seniority as experienced workers in the packing department* * * * [proved] that the Company was motivated to slam the door in their faces * * * because of their affiliation with and support of the union." (Emphasis added.)

Actually, Board counsel misstate the "contention" which is *not* that former satisfactory employees are necessarily more qualified than new applicants, but, rather, that the Board may and does presume on the basis of its experience (cf. *Republic Aviation Corporation v. NLRB*, 324 U.S. 793, 804 (1945) that, absent explanation, non-discriminatorily motivated employers prefer tried and tested former employees to newcomers. Thus, the Board held in the *Jones* case that ignoring

11 out of 16 laid off workers, "in favor of hiring 7 new employees" required "adequate explanation." 131 NLRB 370, 371 (1961). In this case, the Company not only offered *no* explanation for preferring newcomers; it offered *no* explanation for its even more blatantly discriminatory action in *advertising* for outsiders when qualified former strikers were available (Pet. pp. 37, 38).

Thus, an explanation of the Board's deviation from its own and judicial precedents was imperative, see *Labor Board v. Metropolitan Insurance Co.*, 380 U.S. 438, 444-446 (1964). Board counsels' attempted distinction of *Laidlaw* and *Laher* compounds the error; for, not only is it contrary to the teaching of *Metropolitan Insurance* (and countless other cases) that it is the agency's explanation rather than that of counsel which is required, but counsels' purported distinction is factually inaccurate: the presence of "specific evidence of anti-union motivation" (Bd. Opp. n. 19, p. 16), was explicitly treated in *Laidlaw* and *Laher* as an *alternative ground for decision*.

Respectfully submitted,

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